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Supreme Court, U.S.
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No. 87-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ARMCO INC.,

Petitioner,

—v.—

THE MARYLAND CASUALTY COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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LIST OF SUBSIDIARIES OF ARMCO INC.

Acerex
Acerco S.A.
Aceros Comerciales Peru S.A.
Aceros Del Oriente S.A. (Acedor)
Aceros Del Sur S.A. (Adesur)
AH (UK) INC.
AIGI Leasing, Inc.
Armco AB
Armco ApS
Armco Argentina S.A.
Armco Canada Ltd.
Armco Caribbean Corporation
Armco Chile S.A. Sociedad Anonima
Armco Colombiana S.A.
Armco Colombo
Armco Dinslaken GmbH
Armco D.O.
Armco Equipetrol S.A.
Armco Finance (UK) Ltd.
Armco Financial Holdings Corporation
Armco Financial Services Corporation
Armco Financial Services Europe Limited
Armco Financial Services, Inc.
Armco Financial Services International, Inc.
Armco Financial Services International, Ltd.
Armco Flexal B.V.
Armco GmbH
Armco Grinding Systems
Armco Industrial S.A.
Armco Industries (Nigeria) Ltd.
Armco Instapanel S.A.
Armco Insurance Group Inc.
Armco International Inc.
Armco International Insurance Company of Bermuda
Armco Investment Management, Inc.
Armco Limited
Armco Management Corporation
Armco Marsteel Alloy Corporation
Armco Merchandising Limited
Armco Merchandising S.A.
Armco Moly-Cop S.p.A.
Armco National Re Incorporated
Armco National Supply (Australia), Pty. Ltd.
Armco Overseas Corporation
Armco Overseas Manufacturing Corporation
Armco Pacific Financial Corporation
Armco Pacific Financial Services Limited
Armco Pacific Investments, Inc.
Armco Pacific Limited
Armcopaxi S.A.
Armco Peruana S.A.
Armco Realty Corporation
Armco Resources Pty. Ltd.
Armco S.A. (Spain)
Armco S.A. (Spain) Spanish
Armco SARL
Armco SDT Limited
Armco Services S.A.M.
Armco Shipping Limited
Armco (South Africa) (Proprietary) Limited
Armco Steel Corporation
Armco Steel Processing Company
Armco Syndicate Ltd.
Armco Trust Limited
Armco Underwriters Agency, Inc.
Armco Uruguaya S.A.
Armco Venezolana S.A.
Armco Wire Company
Artex Constructors, Inc.
Atlantic National Insurance Company, Ltd.
Australian Steel & Mining Corporation Pty. Ltd.
Autometrios Co.
P.T. Bakrie—Armco
Bellefonte Underwriters Insurance Company
Black River Lime Company
B.N.L.M.S. Limited
British National Insurance Company of Bermuda Ltd.
Bundy Venezolana C.A.
C.A. Armco Venezolana
C.A. Tubos Armco
Colombo Fonderie S.P.A.
Compass Insurance Company
Continental Western Industries, Inc.
Control International, Inc.
The Cumberland Group, Inc.
D.I.F.S.I.C.A.
ENCORP INC. (assets to be sold, corporate entity shall remain for next 5 yrs.)
Everest International, Inc.
Falconbridge Dominicana C.porA.
First Taconite Company
Charles Fulton (Asia) Holdings Ltd.
Charles Fulton (Australia) Pty. Ltd.
Charles Fulton (Malaysia) Sendirian Berhad
Charles Fulton (Singapore) Holdings Ltd.
Charles Fulton (Singapore) 1982 Ltd.
Hangar Facilities, Inc.
Industrias National Supply C.A.
Inmobilliara Hierro y Accro, S.A.
Insurance Management Corporation
Inversiones Armco C.A.
Metaltubos C.A.
MINARMCO S.A.
National Supply Company, Inc.
The National Supply Company of Mexico, S.A.
National Supply France S.A.R.L.
National Supply Stores Pte. Ltd.
NN Administration, Inc.
NN Risk Management Services, Inc.
North Atlantic Management Company Limited
Northern Automatic Electric Foundry, Inc.
Northern Land Company
Northwestern National Casualty Company
Northwestern National Insurance Company
Obras Civiles e Industrias C.A.
Pacific Automobile Insurance
Pacific National Insurance Company
Productos Metalicos Armco S.A.
Prolansa (Productora de Alambres y Derivados S.A.)
Reserve Mining Company
Strata Energy, Inc.
Talbico, Inc.
Torcad Limited
United Lubricants Corporation
Universal Reinsurance Corporation
Virginia Horn Taconite Company
Westchester Nominees Ltd.
Winning Post Investment Ltd.

QUESTION PRESENTED

Whether the decision of the Court of Appeals for the Fourth Circuit defeats the policy of Congress to create a uniform, national framework for the clean up of toxic wastes, under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §9601, *et. seq.*, by finding a wholly artificial distinction between actions by the Government under CERCLA Sections 107(a)(4)(A) and (B) on the one hand and Section 107(a)(4)(C) on the other, to support its holding that an insurer is not liable to defend or indemnify its insured under a policy containing standard comprehensive general liability ("CGL") provisions in an action for clean-up costs under CERCLA Sections 107(a)(4)(A) and (B).

THE PARTIES

Defendant, petitioner herein, is Armco Inc., formerly known as Armco Steel Corporation ("Armco"). Armco is incorporated under the law of Ohio and has its principal place of business in the State of Ohio. Armco engages in various businesses including the manufacture and sale of steel.

Plaintiff, respondent herein, The Maryland Casualty Company ("Maryland Casualty") is incorporated under the law of Maryland. Maryland Casualty is in the business of providing and underwriting insurance. In the present case, Maryland Casualty issued a CGL policy to Armco which was in effect from June 1, 1966 until June 1, 1983.

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OPINIONS BELOW

The opinions pertinent to this Petition are the September 8, 1986 Opinion of the United States District Court for the District of Maryland, 643 F. Supp. 430 (D. Md. 1986) (A-1 to A-10), and the July 6, 1987 Opinion of the United States Court of Appeals for the Fourth Circuit, 822 F.2d 1348 (4th Cir. 1987) (A-11 to A-24).

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on July 6, 1987. A Petition for a Rehearing with Suggestion for Rehearing *En Banc* was filed on July 20, 1987 and denied on August 4, 1987.

This Court's jurisdiction is invoked pursuant to Sup. Ct. R. 20(4) and 28 U.S.C. §§1254(1) and 2101(C).

STATUTORY PROVISIONS INVOLVED

This case involves the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") §§106 and 107(a), 42 U.S.C. §§9606, 9607(a) and the Resource Conservation and Recovery Act ("RCRA") 42 U.S.C. §§6903, 6973. The text of the relevant provisions of CERCLA is set forth at pages A-26 *et seq.* of the Appendix.

STATEMENT OF THE CASE

On August 10, 1982, the United States Government, on behalf of the Environmental Protection Agency ("EPA"), brought suit against Conservation Chemical Company ("CCC") and six co-defendants, including Armco, in the United States District Court for the Western District of Missouri, alleging seepage of hazardous waste from a storage facility operated by CCC in Kansas City, Missouri (the "CCC Litigation"). The suit was brought for injunctive relief and reimbursement for the costs of investigating the nature and scope of the pollution emanating from the site and costs incurred in cleaning up the contaminated area, pursuant to Sections 1004 and 7003 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §6903 and §6973, and Sections 101, 104, 106, and 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§9601-9607(a).

The Government's complaint generally alleged that CCC's improper maintenance techniques—unlined or improperly lined impoundments, deteriorating waste basins, treatment basins which were allowed to overflow, improperly installed storage tanks, improperly sealed and deteriorated drums and unattended spillage of liquid wastes—had resulted in the seepage of hazardous and toxic chemicals into the soil and groundwater surrounding the site. The Complaint asserted that chemicals migrated from the site as leachate into the Missouri and Blue Rivers, creating a threat to persons living in communities down river who used the rivers for crop irrigation, livestock and wild life watering, boating, industrial water supply, and drinking water.

The Complaint alleged that Armco "generated or caused to be transported solid or hazardous wastes, hazardous substances and/or pollutants or contaminants to the CCC-Kansas City site . . ." and thus had "caused or contributed to and [is] causing or contributing to the release or threatened release of hazardous substances from the CCC-Kansas City site which presents or may present an imminent and

substantial endangerment to the public health or welfare of the environment." Armco was alleged to be a "person who . . . arranged with a transporter for the transport for disposal or treatment of hazardous substances . . . at any facility owned or operated by another party" under 42 U.S.C. §9607(a)(3) and was therefore strictly liable for "all costs of removal or remedial action incurred by the United States Government or a state" under 42 U.S.C. §9607(a)(4)(A).

On April 4, 1983, Armco requested coverage under its Maryland Casualty policy for the costs of its defense and for indemnity in the CCC Litigation under the following provisions of its policy:

> (i) [T]o pay on behalf of the insured all sums the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by an occurrence; [and]
>
> (ii) [T]o defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false, or fraudulent. . . .

On April 20, 1983, Maryland Casualty advised Armco that it would not provide coverage or a defense, asserting that the Government's complaint in the CCC Litigation did not state a claim for "damages" but was instead a claim for equitable relief.[1]

On April 2, 1985, Maryland Casualty instituted an action for declaratory judgment pursuant to 28 U.S.C. §§2201 and 2202 against Armco in the United States District Court for the District of Maryland. Jurisdiction was based on diversity of citizenship under 28 U.S.C. §1332.

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[1] Maryland Casualty also alleged that the Government's CCC complaint did not contain an allegation of a specific "occurrence"; that the complaint lacked an allegation of "bodily injury" or "injury to or destruction of property" as defined in the policy; and that the pollution exclusion endorsement in the policy precluded coverage. None of these arguments is at issue in the instant petition.

Meanwhile, in the CCC Litigation, CCC and Hjersted (the site operator defendants) requested their insurers, including Maryland Casualty, to defend and indemnify them for the claims asserted by the United States. That request was also refused. The original generator defendants ("OGDs") including Armco, filed a third-party complaint against CCC's insurers, including Maryland Casualty, asserting that the third-party plaintiffs were intended or creditor beneficiaries of the site operator defendants' insurance policies and that the insurers were obligated to indemnify the OGDs against all damages, costs and fees that they had incurred or would incur. The CGL policy issued by Maryland Casualty to the CCC operator defendants contains language nearly identical to the Maryland Casualty policy at issue in this case.

A Special Master appointed in the CCC Litigation made recommendations that Maryland Casualty and other insurers were obligated to indemnify and defend Armco and other OGDs. Those recommendations were adopted by the district court. *United States v. Conservation Chemical Co.*, 653 F. Supp. 152 (W.D. Mo. 1986). The court found that the deposit of hazardous substances into the CCC site caused injury to the site itself, and that the release and migration of the contaminants damaged and continues to damage surrounding groundwater, surface water and soil. After noting that a great majority of courts have held that response or clean-up costs constitute property damage for the purpose of insurance coverage, the court held that actions seeking recovery for clean-up costs under Sections 107(a)(4) (A) and (B) of CERCLA are equivalent to actions seeking recovery for damages to natural resources under Section 107(a)(4)(C). *Id.* at 194. The measure of damages caused by or arising out of the environmental harm for purposes of CCC's CGL policies was the cost of clean-up and response. *Id.* at 193. The Special Master and the court explictly rejected the insurers' argument that a claim for response costs under CERCLA was a claim for purely equitable relief and thus did not fall within the definition of "damages", concluding that "actions

seeking recovery of cleanup costs . . . are equivalent to actions seeking recovery of damages to natural resources." 653 F. Supp. at 193. In reaching this conclusion, the CCC court applied reasoning similar to that of the court in *United States Aviex Company v. Travelers Insurance Company*, 135 Mich. App. 579, 336 N.W. 2d 838 (1983) (recognizing that the State could have chosen to incur the costs of cleaning up the site itself and then have sued plaintiffs to recover the costs, which would have clearly been a claim for damages under a comprehensive general liability policy, instead of suing to force the responsible party to incur the response cost directly, and terming the choice of one rather than the other "merely fortuitous"). *Id.* at 194.

In this case, the Maryland district court rejected the approach of the *Aviex* court and the Missouri district court in the CCC Litigation, even though Maryland Casualty conceded that, had the Government sued under 42 U.S.C. §9607(a)(4)(C) for "damages for injury to, destruction of, or loss of natural resources," such a suit would have been covered as a claim for damages under Armco's CGL policy. The district court held that Maryland Casualty was not obligated to defend or indemnify Armco because the Government's suit was for equitable relief and not damages. The formalistic and substantively obsolete division between law and equity was found sufficient by the district court to warrant its self-described "arbitrary" holding that the Government's claims were not covered by Armco's CGL policy. 643 F. Supp. at 435.

On appeal, the Fourth Circuit affirmed the district court's decision, although the panel rejected the district court's *ratio decidendi* that a distinction between legal and equitable forms of action governed in these circumstances. Instead, the court of appeals focused on the nature of "damages" as that term is used in insurance policies, and adopted a very restrictive construction which excludes response costs from the definition. *Maryland Casualty Co. v. Armco Inc.*, 822 F.2d 1348, 1352 (4th Cir. 1987). In the Fourth Circuit's analysis, response costs are restitutionary relief,

and bear no particular relationship to the loss of value to property occasioned by environmental contamination. As a result, the panel concurred in the district court's rejection of the "mere fortuity" reasoning of *Aviex, supra*, and the Missouri district court. In fact, despite a finding by the Missouri district court that damage had occurred to the site and surrounding property, the Fourth Circuit found that the Government's clean-up efforts were entirely and exclusively prophylactic. The Fourth Circuit held that since response costs are restitutional, they are not damages within the meaning of the CGL policy.

REASON FOR GRANTING WRIT

This petition presents an issue of substantial national significance involving the frustration of the Congressional policy embodied in an important federal environmental statute, by the denial of liability insurance coverage for claims made by the government against private parties under CERCLA. The decision of the Court of Appeals for the Fourth Circuit is contrary to the purposes of CERCLA and creates an artificial distinction between recovery by the Government under CERCLA Sections 107(a)(4)(A) and (B) and Section 107(a)(4)(C), by holding that Maryland Casualty is under no obligation under the CGL policy to defend or indemnify Armco for response costs sought by the United States Government under CERCLA.

I. The decision of the Fourth Circuit frustrates the congressional policy embodied in CERCLA.

Denial of insurance coverage for response costs claimed in CERCLA actions will have a profoundly negative impact upon the operation of the statute. Requiring generators and site operators to forego insurance coverage for CERCLA claims will inevitably hamper prompt and efficient efforts to clean up hazardous waste sites.

Congress passed CERCLA in 1980 in response to the growing awareness of the dangers presented by the numerous hazardous waste disposal sites throughout the country. H. R. Rep. No. 1016, 96th Cong., Part I at 17–18 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News at 6120. Many of these waste sites were created over a period of decades, and contained toxic wastes produced by tens or even hundreds of disparate industrial concerns. Tracing liability, and in particular, proving negligence or scienter on the part of all of the owner/operators and the "original generator defendants" ("OGDs") would have required more years of complex and costly litigation, even as many of the toxic sites present immediate public health hazards. Thus, two overriding concerns of Congress in drafting CERCLA were (a) attaching liability, and thus the risk of liability, without fault, and (b) assuring a speedy remedial response. *See* H. R. Rep. No. 1016, 96th Cong., at 17 (1980) *reprinted in* 1980 U.S. Code Cong. & Admin. News at 6120 ("This legislation would establish a Federal cause of action in strict liability to enable the administration to pursue rapid recovery of the costs incurred . . . to pursue appropriate environmental response actions with response to inactive hazardous waste sites.").

By construing response costs as falling outside the scope of the term "damages" for liability insurance purposes, the decision below creates an obvious practical obstacle to the prompt clean up of identified hazardous waste sites. Site operators and generators of hazardous waste will be forced to bear the entire cost of remediation. Denying insureds the benefit of insurance coverage for which they bargained, based upon the erroneous characterization of CERCLA Sections 107(a)(4)(A) and (B) as equitable restitution, will discourage operators and OGDs from quickly and efficiently carrying out remedial responsibilities under CERCLA. What is worse, the piece-meal application of state law, with response costs considered as "damages" in one state but not another, will create a patch-work quilt of varying liability and rights under CERCLA, fragmenting what is plainly

intended to be a national, uniform environmental clean-up statute.[2]

II. The decision of the Fourth Circuit creates an artificial distinction between CERCLA Sections 107(a)(4)(A) and (B) on one hand and Section 107(a)(4)(C) on the other.

Congress provided the federal government with a variety of tools to cope with environmental contamination from hazardous waste sites, including traditional equitable relief, 42 U.S.C. §9606, and civil penalties, 42 U.S.C. §§9606(b) and 9608. In addition, Congress enacted a series of cumulative, monetary compensation provisions. 42 U.S.C. §9607(a)(4)(A)-(C). The compensation sections of CERCLA establish a federal cause of action to recover a money judgment:

> [Any person who disposed of hazardous substances at any facility owned or operated by another party or entity containing such hazardous substances and] from which there is a release, or a threatened release which causes the occurrence of a response cost, of a hazardous substance, shall be liable for—
>
> (A) All cost of removal or remedial action incurred by the United States Government or a State not inconsistent with the National Contingency Plan;
>
> (B) Any other necessary cost of response incurred by any other person consistent with the National Contingency Plan; and

[2] It may be appropriate to address the issue directly as a matter of federal common law. The Supreme Court has held that certain matters penumbral to a federal statutory program are more appropriately subject to a uniform, national standard fashioned by the federal courts. *See Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943). This is particularly so where application of a state law rule of decision will frustrate the statutory purpose and leave a national federal program fragmented and subject to uncertainty. 318 U.S. at 367. In the instant case, the Fourth Circuit's decision frustrates federal policy embodied in CERCLA, and a national, uniform rule is most appropriate to assure the enforcement of CERCLA.

> (C) Damages for injury to, destruction of, or loss of natural resources, including the reasonable cost of assessing such injury, destruction, or loss resulting from such a release.

Under each of the subsections, the person or facility charged with responsibility for hazardous waste is subject to liability for damage to the environment in the form of a money judgment. A defendant cannot be compelled under any subsection of CERCLA §107(a) to take any action except to pay a money judgment in a sum certain as determined by a court. That the sums recovered under all three subsections are to be used for a common purpose, i.e., compensation for restoration and repair of the land and its resources, is additional evidence of congressional intent to create cumulative bases for monetary relief under Section 107(a). A separate section of CERCLA further explicates the rule of Subsection (C). CERCLA §107(f), 42 U.S.C. §9607(f), states that:

> In the case of an injury to, destruction of, or loss of natural resources under subparagraph (C) of subsection (a) of this Section, liability shall be to the United States Government and to any State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State. . . . The President, or the authorized representative of any State, shall act on behalf of the public as trustee of such natural resources to recover for such damages. *Sums recovered shall be available for use to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government or the State Government*, but the measure of such damages shall not be limited by the sums which can be used to restore or replace such resources.

(Emphasis provided).

The statutory scheme as interpreted by the Department of the Interior, the executive department charged with carrying out the provisions of CERCLA, explicitly recognizes Congress' intent to make recovery under subsection (C)

overlap and supplement damages recovered under subsections (A) and (B):

> [N]atural resource damages are for injuries residual to those injuries that may be ameliorated in the response action [under subsections (A) and (B)]. . . . This concept of natural resource damages as a residual should prevent the development of two separate actions to ameliorate the same situation.

See 51 Fed. Reg. No. 148, 27,681 (August 1, 1986) (adopting the Department of the Interior's proposed rules for assessment of damage to natural resource). The statute itself states that the measure of damages under subsection (C) "shall not be limited by the sums which can be used to restore or replace such resources." 42 U.S.C. §9607(f).

Taken as a whole, the provisions of CERCLA creating multiple causes of action for damages stand in contrast to the equitable, injunctive relief available under Section 106 of CERCLA, 42 U.S.C. §9606. Section 106 empowers the Government to seek to compel responsible parties to implement a comprehensive remedial program to remediate environmental damage, as well as to prevent future harm. Under the compensation provisions of Section 107 (a), the Government is authorized to seek reimbursement of costs and expense in response to environmental contamination. These reimbursement costs may include costs incurred by the Government prior to the filing of a complaint, which are typically investigatory in nature, costs which the Government has incurred to remedy the damage and abate the contamination, and costs the Government may incur when responsible parties fail to implement appropriate remedial measures. Finally, in the event remedial measures fail to abate environmental damage, the Government may also sue for "damages for injury to or destruction of, or loss of natural resources". 42 U.S.C. §107(a)(4)(C). The goal of CERCLA's liability provisions is the expeditious and cost efficient abatement of environmental damage or contamination.

In this case, the Fourth Circuit reached a decision which is in direct conflict with the statutory scheme of CERCLA. Maryland Casualty brought this declaratory judgment action against Armco in order to avoid its obligation to defend and indemnify Armco in the underlying Missouri CERCLA action brought by the United States Government against Armco and a variety of other OGDs. *United States v. Conservation Chemical Company*, 653 F. Supp. 152 (W.D. Mo. 1986).

In the CCC Litigation, the Government sued for injunctive and monetary relief, seeking to force the site operator and the OGDs to implement a remedial plan to abate the environmental contamination in and around the Kansas City site, and to reimburse the Federal Government for response costs incurred by the Government in responding to environmental contamination of the Missouri site. Armco sought, and was denied, indemnity and the cost of defense of the CCC Litigation from Maryland Casualty under the terms of its comprehensive general liability policy.

The Court of Appeals for the Fourth Circuit, in deciding that Maryland Casualty is under no obligation to defend or indemnify Armco for the response costs sought in the CCC Litigation, has reached a conclusion that is at odds with the intent of Congress in creating the compensation provisions of CERCLA §107(a). The court of appeals found that the "best approach" to the language was to afford the term "damages" the "legal, technical meaning described in [*Aetna Casualty and Surety Company v. Hanna*, 224 F.2d 499, 503 (5th Circuit 1955)]." The question, then, became whether the claim for response costs under CERCLA §107(a)(4)(A) and (B) involved a claim for "damages" properly defined, or whether it asserted a claim for equitable relief. The court concluded that the claims for response costs are not within the coverage of the CGL policy:

> The claim for the reimbursement element arises under CERCLA §107(a), and it is clear that the form of relief requested in *CCC* pursuant to CERCLA §107(a) is not

> "damages" in a legal sense, but rather is a form of equitable, remedial relief.

Maryland Casualty Company v. Armco, Inc., 822 F.2d 1348, 1352 (4th Cir. 1987).[3]

The court of appeals affirmed the district court's rejection of the rationale of a leading case in the area of indemnification of an insured for response costs under an environmental statute, *United States Aviex Company v. Travelers Insurance Company*, 125 Mich. App. 579, 336 N.W.2d 838 (1983). In *Aviex*, the Court held that the term "damages" in a CGL policy included reimbursement of response costs under an environmental clean-up statute. The *Aviex* court reasoned that the state had the choice of suing the insured to recover damages for the injury done to the groundwater, including the cost of cleaning up the groundwater, or to seek an injunction requiring the insured to conduct the clean up itself. The *Aviex* court concluded that:

> It is merely fortuitous from the standpoint of either plaintiff or defendant that the state has chosen to have plaintiff remedy the contamination problem, rather than choosing to incur the costs of clean-up itself and then suing plaintiff to recover those costs.

125 Mich. App. at 590, 336 N.W.2d at 843.

Both the district court and the court of appeals considered the form of the Government's claims for relief more significant than the substance of those claims. The district court accepted the proposition that, had the government brought suit in the CCC Litigation under 42 U.S.C. §9607(a)(4)(C) for "damages for injury to, destruction of, or loss of natural

[3] Curiously, the court of appeals abandoned its legal/equitable analysis in the very next paragraph. Responding to Armco's "creative argument" that CERCLA response costs are, as a form of action, most closely related to an action in quasi-contract, and therefore legal rather than equitable, the court stated, "whether a particular cause of action has historically been considered a 'legal' or 'equitable' proceeding, with differing procedural and substantive rights thereto appertaining, is irrelevant." 822 F.2d at 1352.

resoures," coverage would have been found. The court of appeals rejected the *Aviex* "mere fortuity" argument as being a dangerous step for courts to "begin to construe insurance policies to encompass costs of compliance with injunctive and reimbursement relief." 822 F.2d at 1353.

In holding that no coverage existed, both lower courts failed to acknowledge that Congress intended for all three subsections of CERCLA Section 107(a) to serve as cumulative measures of damages in an abatement action. Any monies recovered in a suit under any of the three subsections of Section 107(a)(4) must be used to "restore [and] rehabilitate", 42 U.S.C. §9607(f), the damaged property. Subsection (C) stands apart only to the extent that it serves as a catch-all remedy for injury to property due to environmental contamination that cannot be abated. The policy revealed in the legislative history, the interpretation of CERCLA by one of its implementing agencies, and a close reading of the statute for an appreciation of the structure of remedial tools available to the government under CERCLA, mandate the conclusion that subsections (A), (B) and (C) are cumulative and overlapping bases by which the government may recover damages as a remedy for contamination of the environment.

III. The decision of the Fourth Circuit ignores the host of decisions by other courts holding that response costs for environmental contamination are damages for purposes of a CGL policy.

The Fourth Circuit's decision runs directly counter to the reasoning of a panel of the Eighth Circuit in *Continental Insurance Companies v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 811 F.2d 1180 (8th Cir. 1987), *pet. for reh'g granted*, 815 F.2d 51 (8th Cir. 1987) ("NEPACCO II"). Although that decision has been suspended by the granting of a petition for rehearing, the persuasive force of the panel opinion stands in marked contrast to the Fourth Circuit's analysis. The court reviewed the extensive list of cases predominantly (although not entirely) holding that environmental response costs are damages under the CGL policy. 811

F.2d at 1186–87. After concluding that environmental contamination causes property damage, and damage to the property interests of the state and federal governments acting as sovereign within their territories, 811 F.2d at 1187, the court addressed the issue of response costs, and in particular, the notion that subsections (A) and (B) are different in kind from subsection (C):

> It seems clear to us that, although subsection (C) directly provides for recovery for damage to natural resources, subsections (A) and (B) are also measures of the damages which governmental entities may recoup for hazardous waste damage to natural resources.

811 F.2d at 1188. This conclusion was supported by the case law and by a close reading of the language of the CGL policy, virtually a duplicate of the provision in Armco's CGL policy. 811 F.2d at 1189. According to the panel, response costs fit within the CGL language without difficulty:

> This [CGL policy] language suggests that once there is property damage—here, environmental contamination—then the damages that flow from that property damage—here, clean-up costs—are recoverable.

Id. (footnote omitted).[4]

Here, the Fourth Circuit ignored the large and growing number of cases holding that response costs sought under an environmental clean-up statute are damages for purposes of CGL insurance. *See, e.g., Township of Gloucester v. Maryland Casualty Company, et al.*, No. 83-4616 (SSB) (D.N.J. August 19, 1987); *Port of Portland v. Water Quality Insurance Syndicate*, 796 F.2d 1188 (9th Cir. 1986); *Consolidated Rail Corp. v. Certain Underwriters of Lloyds, et al.*,

[4] Although technically no dispute of law between the Fourth Circuit and the Eighth Circuit exists at present because of the pending *en banc* decision, should the decision of the district court be affirmed by the Eighth Circuit, under reasoning similar to that of the majority in the panel decision, a very clear conflict will exist. Petitioner will, of course, immediately notify this Court of any action by the Eighth Circuit during the pendency of this Petition.

No. 84-2069 (D. Pa. June 3, 1986); *Kutsher's Country Club Corp. v. Lincoln Ins. Co.*, 119 Misc. 2d 889, 465 N.Y.S. 2d 136 (1983); *Chemical Application Company v. Home Indemnity Co.*, 425 F. Supp. 777 (D. Minn. 1977); *Lansco, Inc. v. Department of Environmental Protection*, 138 N.J. Super. 275, 350 A.2d 520 (Ch. Div. 1975), *aff'd*, 145 N.J. Super. 433, 368 A.2d 363 (App. Div. 1976), *certif. denied*, 73 N.J. 57, 372 A.2d 322 (1977); *Independent PetroChemical Corp. v. Aetna Casualty & Surety Company*, 654 F. Supp. 1334, 1359 (D.D.C. 1986).

Courts have held that response costs constitute "damages" within the meaning of a CGL policy regardless of whether a state or the federal government cleaned up the affected area and then sued to recover the costs of clean up which were incurred, *see, e.g., Kutsher's, supra*, or more commonly, when the insured incurred the clean-up costs itself pursuant to a state or federal enforcement order or under threat of an enforcement suit. *See, e.g., Consolidated Rail Corp., supra; Bankers Trust Company v. Hartford Accident and Indemnity Co.*, 518 F. Supp. 371 (S.D.N.Y. 1981), *vacated by settlement*, 621 F. Supp. 685 (S.D.N.Y. 1981); *Lehigh Electric and Engineering Company v. Selected Risks Insurance Company*, 30 D. & C. 3d 120 (Pa. Comm. Pl., Luzerne Cty. 1982); *Aaronson Associates, Inc. v. Pennsylvania National Mutual Casualty Insurance Company*, 14 D. & C. 3d (Pa. Comm. Pl., Daughin Cty. 1977), *aff'd mem.*, 272 Pa. Super. 606, 422 A.2d 689 (1979).

Moreover, CERCLA Section 107(a) creates a private cause of action for damages, *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 890 (9th Cir. 1986) ("Section 107(a)(2)(B) expressly creates a private cause of action for damages"); *N.L. Industries, Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986), with the measure of damages in subsections (A) and (B) being the cost of clean up. *Compare Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 36 L. Ed. 2d 280, 286 (1973) (in comparing Water Quality Improvement Act of 1970, 33 U.S.C. §§1161, *et seq.* (1972), and a similar Florida act, the court concluded that "the

Federal Act determines damages measured by the cost to the United States for cleaning up oil spills. . . ."); *Riehl v. Travelers Insurance Company*, 22 Env't Rep. Cas. (BNA) 1544, 1546 (W.D. Pa. August 7, 1984), *rev'd on other grounds*, 772 F.2d 19 (3rd Cir. 1985).

The Fourth Circuit relied on only three cases in reaching its conclusion, 822 F.2d at 1352, *citing Aetna Casualty & Surety Company v. Hanna*, 224 F.2d 499 (5th Cir. 1955); *Desrochers v. New York Casualty Company*, 99 N.H. 129, 106 A.2d 196 (1954); *Haines v. St. Paul Fire & Marine Insurance Company*, 428 F. Supp. 435 (D. Md. 1977), none of which addresses the issue of whether environmental response costs are covered as damages under a CGL policy. In *Desrochers*, the insured inadvertently closed a drainage culvert in the course of filling a marsh, which caused periodic flooding and damage to his neighbor's property. The insurer declined to pay the costs incurred by the insured in complying with an injunction issued in an action by the neighbor. The trial court held in favor of the insured, finding that the costs of compliance with the injunction were in lieu of future monetary damages which would be incurred, had the condition not been corrected. On appeal, the Supreme Court of New Hampshire held only that because the insurer's contract had been cancelled, the insurer could not be held for any future damages caused by the flooding and the costs of complying with the injunction could not be termed "in lieu of" future damages. 99 N.H. at 133, 106 A.2d at 199.

Likewise, *Hanna* involved the refusal of an insurer to defend or indemnify an insured sued in the Chancery Court in Florida, where the plaintiff sought an injunction to force the insured to remove landfill from the plaintiff's property that had washed there during a storm, and to build a retaining wall to prevent further damage to the property. Upon failing to comply with an injunction issued by the Court of Chancery, the insured was assessed penalties and damages, although later the suit was revived in the Court of Chancery

in an attempt to force compliance with the original injunction. 224 F.2d at 502.

Finally, in *Haines* the insured claimed coverage under a professional liability policy for defense and indemnity in a suit brought by the Securities and Exchange Commission against the insured to force disgorgement of illegal profits. 428 F. Supp. at 439. The nature of the action and the relief granted in *Haines* was equitable and injunctive, and the relief obviously did not fall under the term "damages" in the professional liability policy. The court found that the SEC suit for restitution of ill-gotten profits was an action for "traditional equitable relief and cannot be considered damages within the policy coverage." *Id.* at 441.

IV. CERCLA response costs are a form of restitution at law, and are the measure of "damages" as defined by CGL policy language.

The Fourth Circuit rejected the structure of CERCLA as it stands, in favor of a purely formalistic analysis: Response costs are a form of restitution, restitution is not "damages", and therefore, response costs are not covered by the language of the CGL policy. A closer look at the statute unmasks the labels attached by the Fourth Circuit. Accepting for the sake of argument that "damages" are defined as "pecuniary compensation or indemnity, which may be recovered in the courts by anyone who suffers loss," *Black's Law Dictionary* 351 (5th Ed. 1979), and that such damages may only be had in a suit at law, CERCLA response costs nonetheless more closely resemble legal damages than an injunction, equitable restitution or any other form of equitable relief.[5]

Response costs are the remedy available in a suit at law. Section 107 of CERCLA, 42 U.S.C. §9606, imposes an obligation which is wholly separate from the injunctive relief available under CERCLA Section 106, 42 U.S.C. §9607. The Supreme Court has held that an action to enforce a liability

[5] Seng, Beverly S., *Quasi Contractual Nature of Cost Recovery Actions Under CERCLA*, 5 Va. J. Nat. Res. Law 85 (1985).

created by a statute is an action at law. *Lantry v. Wallace*, 182 U.S. 536, 548 (1901) ("The present action is beyond question one at law. Its object is to enforce a liability created by statute. . . ."); *Abell v. Anderson*, 148 F.2d 372, 374 (6th Cir. 1945). Restitution is available at law as well as in equity. Restatement (Second) of Restitution, tentative draft No. 1, at 1 (1983) ("Restitution at law is the progeny of the action of assumpsit—especially one of the so-called common counts of indebitatus assumpsit—which gave rise to the general theory of money recovery known as quasi-contract."); Restatement of Restitution, §4(f) (1937) ("In situations in which a person is entitled to restitution, he is entitled in an appropriate case to . . . (f) a judgment at law or decree in equity for the payment of money. . . .").

Equitable restitution is quite different in purpose and in measure from legal restitution. Equitable restitution most commonly takes the form of disgorgement: The defendant has been unjustly enriched and the remedy is to compel the defendant to give back the undeserved gain. *See, e.g., Ohio Drill and Tool Company v. Johnson*, 498 F.2d 186, 193 (6th Cir. 1974); *Haines v. St. Paul Fire and Marine Insurance, supra*; D. Dobbs, *Remedies* §41 at 224 (1975). The remedy is not, as is the case with CERCLA response costs, measured by the extent of the plaintiff's injury, but rather by the amount of the defendant's unjust enrichment. By contrast, as noted in the Seng article, *supra*, restitution at law has been available for recovery of expenses incurred in providing necessaries to the defendant,[6] recovery for the costs of performing the defendant's duty,[7] and provision of public necessaries, such as the cost of repair or removal of public

[6] See, for example, the physician's recovery for rendering medical aid in an emergency. Restatement of Restitution §116 (1937); *Cotnam v. Wisdom*, 83 Ark. 601, 104 S. W. 164 (1907).

[7] Restatement of Restitution §113 (1937); *Cass v. Anderson*, 154 Minn. 162, 191 N.W. 407 (1923).

nuisances.[8] Liability does not arise until the plaintiff performs the duty and incurs the out-of-pocket expense.[9] Plainly, response costs under CERCLA are more akin to legal restitution than to equitable restitution.

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[8] *Wyandotte Transportation Company v. United States*, 389 U.S. 191, 204 (1967), *citing* Restatement of Restitution §115 (1937). The measure of relief for an action at law to recover the costs of removing a public nuisance is not the defendant's unjust enrichment, but the plaintiff's out-of-pocket cost in performing the defendant's duties.

[9] Seng, *supra*, 5 Va. J. Nat. Res. Law at 98–99.("[T]he benefit to the defendant may be intangible, even ficticious, but it is presumed in the law. Consequently, the usual measure of recovery, the benefit or enrichment of the defendant, is replaced by the measure of the plaintiff's outlay.").

CONCLUSION

The Fourth Circuit's decision frustrates the underlying policies of CERCLA by creating an artificial distinction between CERCLA subsections (A) and (B) on the one hand and subsection (C) on the other and fostering very real obstacles to prompt and efficient remedial efforts on the part of parties primarily liable under CERCLA. The reasoning of the court of appeals runs counter to the overwhelming majority of opinions which hold that response costs are damages within the meaning of the CGL policy. By allowing the opinion to stand, enforcement of an important national environmental statute will be hamstrung. For the foregoing reasons, Armco Inc. respectfully asks that this court grant its Petition for Certiorari and set the case for briefing and oral argument.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

THE MARYLAND CASUALTY COMPANY	*	
v.	*	CIVIL NO. Y-85-1396
ARMCO, INC.	*	

* * * * * * * * * * * * * * * * *

Filed: September 1986

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Mark R. Engel, Esquire, Baltimore, Maryland, Benjamin Rosenberg, Esquire, Baltimore, Maryland, and Robert J. Proutt, Esquire, Baltimore, Maryland, counsel for the defendant.

YOUNG, United States District Judge

MEMORANDUM

The Maryland Casualty Company seeks a declaratory judgment that it does not have a duty to defend a Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") suit brought against its insured, Armco, Inc., and a host of other defendants in the Western District of Missouri. *United States v. Conservation Chemical Co.*, No. 82-0983-CV-W-5. Maryland Casualty issued general business insurance policies to Armco from 1966 to 1983. The parties do not dispute the terms of those insurance policies or the underlying facts in the *Conservation Chemi-*

cal Co. ("*CCC*") litigation, and have filed cross motions for summary judgment. No hearing is necessary. Local Rule 6.

The Environmental Protection Agency's complaint in the *CCC* case alleges that a toxic waste site in Kansas City, owned and maintained by the Chemical Conservation Company, is leaking hazardous substances into the water tables of the Missouri and Blue Rivers. The complaint names Armco as one of several defendants who generated hazardous waste present at the site. The parties in this case have represented to the Court that Armco hired Conservation Chemical to dispose of its wastes, and that Conservation Chemical improperly stored Armco's wastes at the site over a period of years. Armco thus appears to be a "person who . . . arranged with a transporter for transport for disposal or treatment, of hazardous substances . . . at any facility owned or operated by another party" under 42 U.S.C. § 9607(a)(3). The EPA complaint alleges that, as such, Armco is strictly liable for "all costs of removal or remedial action incurred by the United States Government or a "state" under 42 U.S.C. § 9607(a)(4)(A).

The contracts between Maryland Casualty and Armco do not specify whether the parties intended the contracts to be interpreted according to the law of a particular jurisdiction. In a diversity case such as this, the Court must look to the choice of law rules of Maryland, the forum state. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941). Maryland follows the rule of *locus contractus*, applying the law of "the place where the last act is performed which makes an agreement a binding contract." *Grain Dealers Mutual Insurance Co. v. Van Buskirk*, 241 Md. 58, 65–66 (1965); *Sun Insurance Office, Ltd. v. Mallick*, 160 Md. 71, 81 (1931); *Haines v. St. Paul Fire & Marine Insurance Co.*, 428 F. Supp. 435 (D. Md. 1977); *Riviera Beach Volunteer Fire Co., Inc. v. Fidelity & Casualty Co. of New York*, 388 F. Supp. 1114, 1119–20 (D. Md. 1975).

Counsel for both parties have orally represented to the Court that the insurance contracts at issue were signed in

Maryland, and agree that Maryland law applies. The Court finds no dispute of material fact on this issue, and will apply Maryland law. "Maryland has not adopted the rule, followed in many jurisdictions, that an insurance policy is to be most strongly construed against the insured. If the language of an insurance contract is ambiguous, however, construction is for the jury, and the ambiguity is to be resolved against the company who prepared the policy and in favor of the insured." *National Grange Mutual Insurance v. Pinkney*, 284 Md. 694, 705 (1979) (citations omitted), *quoting Government Employees Insurance v. DeJames*, 256 Md. 717, 720 (1970).

In its motions for summary judgment, Maryland Casualty argues that it is not obligated to defend Armco in the *CCC* litigation because the EPA's complaint does not assert claims for legal "damages" within the meaning of Maryland Casualty's policies. Because the Court finds that Maryland Casualty is entitled to summary judgment on this issue, it is unnecessary to consider the other contentions of the parties.

The insurance contracts limit Maryland Casualty's duty to defend to a "suit against the insured . . . seeking damages," and limit the duty to indemnify to "sums which the insured shall become legally obligated to pay as damages." Policy No. 31R-0038550, Defense, Settlement, Supplementary Payments, Subsection (a); Coverage C - Property Damage Liability - Except Automobile. The word "damages" is not ambiguous in the insurance context. Black letter insurance law holds that claims for equitable relief are not claims for "damages" under liability insurance contracts. *See, e.g., Haines v. St. Paul Fire & Marine Insurance Co.*, 428 F. Supp. 435 (D. Md. 1977) (Blair, J.); *Aetna Casualty and Surety Co. v. Hanna*, 224 F.2d 499 (5th Cir. 1955); *Desrochers v. New York Casualty Co.*, 106 A.2d 196 (N.H. 1954).

The government's *CCC* complaint sought injunctive relief against Armco, as well as reimbursement for "all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national

contingency plan," under 42 U.S.C. § 9607(a)(4)(A). Judge Wright of the Western District of Missouri appointed a special master, Professor Robert H. Freilich of the University of Missouri at Kansas City, to help resolve the *CCC* litigation. The special master recommended that a *CCC* defendant's request for a jury trial be denied, on the grounds that the government's suit for response costs were analogous to an equitable claim for restitution. *See* Special Master's Recommendation Regarding General Dynamics Corporation's Demand for a Jury Trial (April 29, 1985). Judge Wright approved the special master's recommendation by Order dated May 14, 1985.

The Seventh Amendment does not provide a right to a jury trial "if viewed historically the issue would have been tried in the courts of equity . . . ." 9 Wright & Miller, *Federal Practice and Procedure*, Civil § 2302, p. 15 (1971). Judge Wright's Seventh Amendment analysis of the CERCLA statutory scheme followed the unanimous decisions of other courts faced with the same issue. This Court has also denied a demand for a jury trial in a CERCLA case. *See United States v. Dickerson*, No. Y-85-3249, memo. op. at 12 (May 28, 1986); *see also United States v. Mottolo*, 605 F. Supp. 898, and cases cited at 913 (D. N.H. 1985).

Recently, the special master recommended that the government's *CCC* complaint alleges claims for "damages" for purposes of comprehensive general liability insurance policies. *See* Special Master's Recommendation on Motions for Summary Judgment Regarding Insurance and Indemnification, memo. op. at 132 (June 27, 1986) (hereafter "Special Master's Recommendations"). Maryland Casualty has represented to the Court that Judge Wright entered an order adopting the special master's recommendations on July 10, but said that he would vacate the order as to Maryland Casualty and two other insurers who had settled before entry of the order. Judge Wright apparently has deferred entry of that order to vacate pending further settlement negotiations between all parties still involved. *See* letter to

the Court from counsel for Maryland Casualty, July 18, 1986, pp. 1–2.

In this posture, the special master's recommendations are not *res judicata* against Maryland Casualty. They are also unpersuasive as precedent. Professor Freilich, in some detail, explained why actions to recover response costs alleged "property damage" under the insurance contracts. Special Master's Recommendations at pp. 63–81. This Court agrees with the special master's common sense conclusion that toxic waste dumps that contaminate the environment cause "property damage;" it reached the same result in *Mraz v. American Universal Insurance Co.*, 616 F. Supp. 1173, 1177 (D. Md. 1985), appeal filed, No. 85–2399 (4th Cir. November 26, 1985). The "property damage" issue is distinct from the "damages" issue, however. As Professor Freilich noted, the typical business liability policy reads: "The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . property damage. . . ." Special Master's Recommendations at p. 70. In the unambiguous wording of the policy, even if a lawsuit against the insured alleges "property damage," it must also make claims for "damages" before the insurer becomes obligated to defend or indemnify.

This Court was not presented with the "damages" issue in the *Mraz* litigation. *See* Pretrial Order filed June 26, 1985, section 2(c), pp. 8–10. Maryland Casualty squarely presented Special Master Freilich with the "damages" issue in the *CCC* litigation, and he acknowledged that it was different than the "property damage" issue noting:

> To the extent that Maryland [Casualty]'s argument once again raises the question of whether "cleanup costs" constitute "property damage" for purposes of liability insurance coverage, the Special Master rejects Maryland's argument. [The special master had already rejected that argument at pp. 63–81 of his memorandum.] To the extent that Maryland's argument interprets "damages" as com-

> pensation for injury or loss and excludes the cost of complying with equitable or injunctive orders, the Special Master believes the argument interprets "damages" too narrowly. The Special Master interprets "damages" to be sums which the insured is obligated to pay by reason of liability imposed by law, and adopts the reasoning of the Court in *United States Aviex Co. v. Travelers Ins. Co.*, 125 Mich. App. 579, 336 N.W.2d 838 (1983).

Special Master's Recommendations at 132.

To adopt the reasoning of the *Aviex* decision is to adopt no reasoning at all. In that case, the insured operated a chemical plant in Niles, Michigan that had been destroyed by fire. Chemicals from the plant mixed with water used to put out the fire and percolated into the ground, contaminating the groundwater. The State of Michigan ordered the insured to clean up the contamination. The insured paid a consulting firm to analyze the damage, but dragged its feet when the consultants estimated that clean-up operations would cost over a million dollars. The State of Michigan threatened the insured with legal action. Under Michigan's statutory scheme, the State could have sought an order for abatement of water pollution, a criminal complaint, injunctive relief, or damages for injuries done to the national resources of the state. 336 N.W.2d 841, 843. Before the State pursued any of these remedies, the insured sued its insurer for a declaratory judgment. The trial court held that the insurer was obligated

> to defend any claim or action and to pay for any damages to the extent of the policy's monetary limits determined by a tribunal of competent jurisdiction, which damages will include the costs of plaintiff imposed by such tribunal or resulting from a determination by such tribunal for correcting the chemical contamination of the percolating or ground water underneath plaintiff's premises caused by the fire. . . . The obligation of the defendant includes reimbursement of plaintiff for the costs and

expenses of any study and testing incurred by the plaintiff to date.

336 N.W.2d at 841.

On appeal, the insurer argued that "damages" did not include costs incurred in complying with equitable or injunctive orders. The Court of Appeals of Michigan affirmed. The *Aviex* court recognized that "Defendant's argument is persuasive and supported by decisions from several other jurisdictions," and cited *Aetna Casualty Co. v. Hanna, supra*; *Desrochers v. New York Casualty Co., supra*; and *Ladd Construction Co. v. Insurance Company of North America*, 391 N.E.2d 568 (Ill. App. 1979). 336 N.W.2d 842–43.

The *Aviex* court declined to follow this "persuasive" precedent, however, holding:

> In our opinion, this reasoning interprets "damages" too narrowly. . . . [T]he Attorney General is empowered to file a suit "to recover the full value of the injuries done to the natural resources of the state. . . ." [sic] This language clearly indicates the state's interest in its natural resources. Defendant agrees that the contamination of subterranean and percolating water as a result of the fire is "physical injury to tangible property" within the terms of the insurance policy [the equivalent of the "property damage" issue]. If the state were to sue in court to recover in traditional "damages," [sic] including the state's costs incurred in cleaning up the contamination, for the injury to the groundwater, defendant's obligation to defend against the lawsuit and to pay damages would be clear. It is merely fortuitous from the standpoint of either plaintiff or defendant that the state has chosen to have plaintiff remedy the contamination problem, rather than choosing to incur the costs of clean-up itself and then suing plaintiff to recover those costs.

336 N.W.2d 843.

It was no coincidence that the *Aviex* court did not cite a single authority in support of its "mere fortuity" argument, because that argument violates one of the major tenets of

black letter insurance law. An insurer has an obligation to assess its duty to defend and indemnify against the allegations in the complaint alone. *See generally, Brohawn v. Transamerica Insurance Co.*, 276 Md. 396 (1975); *Board of County Commissioners of the County of Larimer v. Guarantee Insurance Co.*, 90 F.R.D. 405, 407–408 (D. Colo. 1981); *Ladd Construction Co., supra*, 391 N.E.2d at 572–73:

> Should we indulge in speculation as to whether a court by exercising its inherent power might award damages when none were sought and then conclude that such inherent power exists and insurance company [sic] must defend an action, then we would by speculation be altering the responsibilities between parties as set forth in an insurance contract. Moreover, a giant if not final step would have been taken in support of a proposition that an insurance company would be under an obligation to defend all suits, regardless of policy provisions or allegations contained in a complaint. Such a result could well create havoc as to both the insurers and the insureds.

Traditionally, courts have found no insurance coverage for the costs of complying with an injunction even in cases where the suits could have been brought for damages. *See Aetna Casualty and Surety Co. v. Hanna, supra*, 224 F.2d 503; *Ladd Construction Co. v. Insurance Co. of North America, supra*, 391 N.E.2d at 572–73; *Garden Sanctuary, Inc. v. Insurance Co. of North America*, 292 So.2d 75, 76–77 (Fla. App. 1974). Maryland Casualty concedes that the government could have brought its *CCC* suit under 42 U.S.C. § 9607(a)(4)(C) for "damages for injury to, destruction of, or loss of natural resources," and that such a suit would have alleged claims for "damages" under the insurance contracts. But, the government chose not to bring suit under the "damages" provisions of CERCLA, apparently preferring the equitable remedy of restitution. Maryland Casualty is obligated to defend or indemnify real lawsuits, not hypothetical ones.

Professor Freilich and the *Aviex* court tried to get around this result by saying that damages to the environment are measured by the costs of clean-up. *See* Special Master's Recommendations at 80, 132; *Aviex, supra*, 336 N.W.2d 843. Armco adds a wrinkle to that argument by suggesting that in claims for clean-up, money is the "essence" of the government's claims, unlike in other equitable suits, which presumably focus on injunctive relief. The difficulty with these arguments is that they apply with equal force to the Seventh Amendment analysis of CERCLA clean-up suits; clean-up costs cannot be the equivalent of damages, or "essentially" monetary, for purposes of interpreting an insurance contract, and also be equitable for Seventh Amendment purposes.

The Special Master's suggestion that "damages" are "sums which the insured is obligated to pay by reason of liability imposed by law" appeals to common sense. That is why people buy insurance, after all, and why should outdated distinctions between law and equity get in the way? It is true that no practical difference exists between sums which the insured must pay the court under some equitable remedy as opposed to sums payable for damages. But there is also no practical difference between sums which the insured must pay the court and sums which the insured must pay to comply with an injunctive order. Obviously, an insurer cannot be required to pay the costs of its insured in complying with every new government regulation.

Insurance contracts must draw the line somewhere, and under law clearly established by 1955, these contracts drew the line at the historic division between law and equity. Every court that has considered the question has held that CERCLA response cost suits fall on the equity side of the line. Arbitrary as it may appear, Maryland Casualty is entitled to the benefit of its bargain.

/s/

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

THE MARYLAND CASUALTY COMPANY	*	
v.	*	CIVIL NO. Y-85-1396
ARMCO, INC.	*	

* * * * * * * * * * * * * * * * *

ORDER

In accordance with the attached Memorandum, it is this day of September, 1986, by the United States District Court for the District of Maryland, ORDERED:

1. That the motion of Maryland Casualty for summary judgment BE, and the same IS, hereby GRANTED;

2. That the motion of Armco, Inc. for summary judgment BE, and the same IS, hereby DENIED;

3. That the cross-motion for summary judgment by Maryland Casualty BE, and the same IS, DENIED AS MOOT;

4. That the Pretrial Order in *Mraz v. American Universal Insurance Co.*, Y-84-4426, and counsel for Maryland Casualty's letter to the Court dated July 18, 1986, be made part of the record in this case;

5. That judgment BE, and the same IS, ENTERED in favor of Maryland Casualty; and

6. That a copy of this Memorandum and Order be mailed to counsel.

/s/

United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-3125

The Maryland Casualty Company,
Plaintiff—Appellee,

versus

Armco, Inc.,
Defendant—Appellant,

Lumbermens Mutual Casualty Company;
AT&T Technologies, Inc.; State of Missouri;
Insurance Environmental Litigation Association;
Keith Rayment

Amici Curiae.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Joseph H. Young, District Judge. (CA-85-1396)

Argued: March 2, 1987 Decided: July 6, 1987

Before WIDENER, SPROUSE, and CHAPMAN, Circuit Judges.

Benjamin Rosenberg (Craig E. Smith; James R. Moxley, III; Marc R. Engel; W. Warren Hamel; Venable, Baetjer & Howard on brief) for Appellant; Thomas William Brunner (Steven C. Kahn; Jeffrey F. Liss; Laura A. Foggan; John W. Cavilia; Piper & Marbury on brief) for Appellee; (Robert N. Sayler; John E. Heintz; William F. Greaney; Frederick G. Harold; Covington & Burling on brief) for Amicus Curiae AT&T Technologies, Inc., The Boeing Company, Carter Day Industries, Inc., Chemical Manufacturers Associations, Ex-Cell-O Corporations, International Business Machines Corporation, Key Pharmaceuticals, Inc., SCM Corporation, Stauffer Chemical Company and 3M Company; (Richard L. Blatt; Richard S. Borland; Ellen J. Kerschner; Robert W. Hammesfahr; Peterson, Ross, Schloerb & Seidel; Patrick M. Sweeney; Beverly L. Crump; Douglas M. Palais; McSweeney, Burtch & Crump on brief) for Amicus Curiae Keth Rayment; (William L. Webster, Attorney General; Shelley A. Woods, Assistant Attorney General on brief) for Amicus Curiae State of Missouri; (Timothy C. Russell; Thomas S. Schaufelberger; Drinker, Biddle & Beath on brief) for Amicus Curiae Lumbermens Mutual Casualty Company; (Roger E. Warin; Virginia L. White-Mahaffey; Helen D. Irvin; Michael J. Markoff; Steptoe & Johnson on brief) for Amicus Curiae Insurance Environmental Litigation Association.

CHAPMAN, Circuit Judge:

The appellee, The Maryland Casualty Company, sought a declaratory judgment concerning its liability to its insured, Armco, Inc., arising out of a suit brought against Armco by the United States. The underlying suit is a claim against Armco for reimbursement and injunctive relief because of an alleged endangerment to the environment at a hazardous waste site in Missouri. The question presented is whether the claim brought against Armco in Missouri constitutes a claim for "damages" as defined in the insurance agreement between Armco and Maryland Casualty. We hold that the claim seeking compliance with regulatory directives of a federal agency, which compliance takes the form of obedience to injunctions and reimbursement of remedial costs, does not constitute a claim for "damages" under the insurance policy. We affirm the decision of the district court that Maryland Casualty is not obligated to indemnify nor defend Armco in the Missouri litigation

I

At issue is a general comprehensive liability policy first negotiated between Maryland Casualty and Armco in 1966. Modified periodically, it remained in effect until June 1, 1983. Totaling one hundred and fifty-eight pages, the policy is "manuscript" in several instances: that is, some provisions are negotiated and specifically written for this insured. In pertinent part, the policy obligates Maryland Casualty:

> [T]o pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by an occurrence; [and]
>
> [To] defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false, or fraudulent. . . .

In the Missouri litigation, *United States v. Conservation Chemical Company*, 82-0983-CV-W-5 (W.D. Mo. Sept. 2,

1986) ("*CCC*"), the United States brought suit against both the owners of the waste storage facility and the "original waste generator" defendants, which latter group included Armco. The complaint alleged that improper maintenance techniques utilized in storing the hazardous waste resulted in the seepage of toxic chemicals into the soil and groundwater surrounding the site and surface flows off the site and onto adjoining property. The complaint also alleged that the chemicals have migrated from the site as leachate into the Missouri and Blue Rivers and thus pose a threat to persons living in communities downriver who use the rivers for crop irrigation, livestock and wildlife watering, boating, industrial water supply and as a source of drinking water.

The suit was brought pursuant to the Resource Conservation and Recovery Act of 1976, *as amended*, 42 U.S.C. §§ 6901-91, and the Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980) ("CERCLA"). Among its CERCLA claims the government sued under § 106 and under § 107, 42 U.S.C. § 9607(a)(4)(A) seeking to compel the responsible parties to implement a comprehensive remedial action program and seeking reimbursement for all of its investigatory and other response costs and enforcement activities related to the site and for the costs incurred or to be incurred in cleaning up the affected area.

CERCLA § 107, 42 U.S.C. § 9607 reads in pertinent part:

> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—
>
> (A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.[1]

In January 1986, the original waste generator defendants in the *CCC* litigation, including Armco, filed an amended third-party complaint against the site operator defendants' primary and excess insurers, including Maryland Casualty, alleging that the third-party plaintiffs were intended and/or creditor beneficiaries of the site operator defendants' insurance policies. The complaint asserted that the insurers were obligated to indemnify the original waste generator defendants against all damages, costs and fees which they had incurred or would incur. The insurance policy between Maryland Casualty and the *CCC* operator defendants contained nearly identical language to the Maryland Casualty—Armco policy at issue in this case.

The special master appointed in *CCC* found that Maryland Casualty was under an obligation to indemnify and defend Armco in the *CCC* litigation. Specifically, the master determined that environmental harm constitutes "property damage" as defined in the insurance policy, and that environmental response costs constitute "damages" as contained in the policy. The district judge in *CCC* signed an order which adopted, in substantial part, the recommendations of the special master. Immediately thereafter, Maryland Casualty and two other insurers informed the judge that they wished to complete a settlement with the original generator defendants, including Armco. The district judge stated that he would set aside his order *nunc pro tunc* as to any settling insurers. The settlement was reached, and the order was vacated.

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[1] Section 9607 was slightly amended by Pub. L. 99-499, effective October 17, 1986, but this amendment has no bearing on this litigation.

The district court in the present litigation found that the action taken by the Missouri district court did not render the present controversy res judicata, and did not give rise to collateral estoppel. Addressing the case on the merits, the court held that Armco was not entitled to defense costs and indemnity from Maryland Casualty in the *CCC* litigation. *Maryland Casualty Company v. Armco, Inc.*, 643 F.Supp. 430 (D.Md. 1986). The court stated that "[b]lack letter insurance law holds that claims for equitable relief are not claims for 'damages' under liability insurance contracts." *Id.* at 432. The district court then inquired into whether *CCC* involved a claim for equitable relief. The court considered whether the nature of that claim was a "legal" or "equitable" claim as historically defined, and analogized to judicial interpretations of the Seventh Amendment right to a jury trial. Because "[e]very court that has considered the question has held that CERCLA response cost suits fall on the equity side of the line," *id.* at 435, the *CCC* claim was not a legal claim, and therefore was not a suit for damages against which Maryland Casualty must defend and indemnify.

II

Maryland Casualty's obligations under the terms of the insurance agreement arise only where the insured has become "legally obligated to pay as damages because of injury to or destruction of property. . . ." It is black-letter law that the terms of an insurance policy are to be construed according to the meaning a reasonably prudent layman would infer. *Pacific Indemnity Company v. Interstate Fire & Casualty Company*, 302 Md. 383, 488 A.2d 486, 488 (1985). Under this standard, Armco and its *amici* AT&T, et al., argue that the term "damages" connotes virtually any claim for monetary relief.

Judicial decisions, although not rejecting the rule of construction that terms of an insurance contract are to be given their ordinary meaning, have nevertheless limited the

breadth of the definition of "damages" somewhat more narrowly than the appellant suggests. "Damages," as distinguished from claims for injunctive or restitutionary relief, includes "only payments to third persons when those persons have a legal claim for damages. . . . *Aetna Casualty and Surety Company v. Hanna*, 224 F.2d 499, 503 (5th Cir. 1955). *See also, Desrochers v. New York Casualty Company*, 99 N.H. 129, 106 A.2d 196 (1954). Thus "damages" is to be construed in consonance with its "accepted technical meaning in law." *Hanna*, 224 F.2d at 503. Maryland law, which governs the construction of this agreement, has similarly adopted the somewhat narrow, technical definition of damages. *See, e.g., Haines v. St. Paul Fire and Marine Insurance Company*, 428 F.Supp. 435 (D. Md. 1977) (holding that a claim for restitution of ill-gotten profits was an action for "traditional equitable relief and cannot be considered damages within the policy coverage").

The best approach in construing the term "damages" as contained in this insurance contract is to afford it the legal, technical meaning described in *Hanna*. The contract obligates Maryland Casualty to pay where its insured become obligated "to pay as damages. . . ." If the term "damages" is given the broad, boundless connotations sought by the appellant, then the term "damages" in the contract between Maryland Casualty and Armco would become mere surplusage, because any obligation to pay would be covered. The limitation implied by employment of the phrase "to pay as damages" would be obliterated. We thus proceed to examine whether the claim for relief in the *CCC* litigation involves a claim for "damages" properly defined, or whether it asserts claims for equitable relief.

In the *CCC* litigation, the government sought both injunctive relief and restitution in the form of reimbursement of costs, including engineering and clean-up costs, in connection with the allegedly hazardous waste contamination in Missouri. The claim for the reimbursement element

arises under CERCLA § 107(a), and it is clear that the form of relief requested in *CCC* pursuant to CERCLA § 107(a) is not "damages" in the legal sense, but rather is a form of equitable, remedial relief. Because we adopt the construction of the term "damages" as employed by the court in *Hanna* and the other cases cited, we find the claims raised in *CCC* are not within the coverage of the insurance contract. The general comprehensive liability policy between the parties covers "damages," but not the expenditures which result from complying with the directives of regulatory agencies.

Armco and its *amici* proffer the creative argument that an action for restitution which arises from the fulfillment of one's legal obligation by another is an action in quasi-contract, and therefore is an action at law, and not in equity. This argument, however, misperceives the focus of the inquiry. In defining "damages," and distinguishing "damages" from equitable remedies, we focus not on the *nature* of the underlying action, but rather on the form of *relief* sought. In other words, whether a particular cause of action has historically been considered a "legal" or "equitable" proceeding, with the differing procedural and substantive rights thereto appertaining, is irrelevant. The insurance contract, which controls the obligations between the parties and therefore centers the focus of this court, is written in terms of the relief sought, and not in terms of the form of the cause of action. The contract describes "damages" to be paid, and not liabilities arising out of "legal," rather than "equitable" proceedings.

The appellant relies upon two decisions that have held that a claim for apparent equitable relief for reimbursement of environmental cleanup expenses is a claim for "damages" as used in the standard general comprehensive liability policy. We find these decisions unpersuasive. In *United States Aviex Company v. Travelers Insurance Company*, 125 Mich. App. 579, 336 N.W.2d 838 (1983), the court held that the

term "damages" included monies recovered to reimburse the government for costs incurred in investigating and correcting chemical contamination of percolating waters. In rejecting the argument that the term "damages" should be limited to compensation for injury or loss, as distinguished from costs incurred in complying with equitable or injunctive orders, the court noted that other jurisdictions had recognized this distinction, citing *Hanna* among other decisions. Rejecting the definition employed in other jurisdictions as being too narrow, the court in *Aviex* reasoned that the "merely fortuitous" event that the state has chosen to clean the contamination itself and then sue for reimbursement, rather than suing straightforwardly for damages, should not excuse the insurer from liability on its policy. According to the *Aviex* court the measure of damages to natural resources is measured simply as the costs of restoration, and whether a plaintiff sues for the damages or the costs should not determine the coverage under the insurance policy.

We think this reasoning is faulty for two reasons. First, it is not necessarily correct that the measure of relief is unrelated to whether the government sues for reimbursement or for damages. Damages is a form of substitutional redress which seeks to replace the loss in value with a sum of money. Restitution, conversely, is designed to reimburse a party for restoring the status quo. It might very well cost far more to restore a contaminated marsh than it would to pay damages for its loss. *See, e.g., Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109 (Okla. 1962), *cert. denied*, 375 U.S. 906 (1963) (where the cost of restoring strip-mined land was more than quadruple its potential value in the restored condition).

Second, even assuming that the costs to the defendant are the same regardless of whether the government sues for restitution or for damages, thus in some sense rendering the decision by the government regarding whether to sue for

damages or restitution a "mere fortuity," it is a great step, and a dangerous one, for courts to begin to construe insurance policies to encompass costs of compliance with injunctive and reimbursement relief.

Insurance policies, probably for reasons of certainty and economy, traditionally reimburse only damages arising from actual, tangible injury. Insurers are very reluctant to cover what are essentially prophylactic measures, such as safety precautions, for the obvious reason that such expenditures are subject to the discretion of the insured, and are not connected with any harm to specific third parties. Insurers require certainty as to the extent of their liability and this certainty is set forth in the insurance policy, which in the instant case was a negotiated manuscript policy. The less obvious, but perhaps more telling reason that insurers are reluctant to cover avoidance costs is that insureds are far more likely to over-utilize safety measures where another party is paying the bill. Should policies be construed to cover some forms of harm-avoidance measures, courts would be faced with the very difficult problem of separating needed prophylactic measures from unnecessary or inefficient ones.

From an insurer's perspective, investigative and remedial action taken by the government respecting potential environmental hazards constitutes a prophylactic measure. In the *CCC* litigation which underlies this case, the government, choosing not to wait and learn whether the environmental spill in Missouri created a hazard which would cause harm to the wildlife and humans in the Missouri River and Blue River region, has intervened immediately upon learning of the toxic contamination. The case thus presents no instance of harm to human or animal life, but merely the prevention of such harm. Even if some such harm had occurred, the fundamental nature of the government's intervention is the same: the government seeks to prevent or mitigate the occurrences or reoccurrences of hazardous con-

tamination. This action is fundamentally prophylactic, and is not of the sort that Maryland Casualty contracted to cover.

Armco also relies upon the recent decision in *United States v. Northeastern Pharmaceutical and Chemical Company*, No. 84-1837 (8th Cir. Dec. 31, 1987) (NEPACCO). In a 2-1 decision, the court held that damage to the environment constitutes "property damage" as contained in that insurance policy.[2] The court, however, in an apparently advisory spirit, continued beyond its holding to address the issue of whether the term "damages" as used in the standard general comprehensive liability policy includes claims for reimbursement and other equitable relief. The court held that "damages" does include claims for equitable relief, reasoning that the measure of damages is the same regardless of whether the suit seeks damages or reimbursement. Thus this decision rests on the same logic we find faulty in *Aviex*.

Maryland Casualty has contracted with Armco to reimburse only where Armco is obligated to pay damages which result from injury, which in the insurance context means damages in the legal sense. In the absence of clear contract language or specific Congressional authorization in CERCLA, we decline to extend the obligations of insurance carriers beyond the well-illumined area of tangible injury and into the murky and boundless realm of injury prevention. We hold that the costs to Armco of complying with the directives of a regulatory agency are not covered within the terms of the insurance policy.

III

Armco has argued that the duty to defend is broader than Maryland Casualty's obligation to reimburse Armco for damages and that the district court erred in construing the

[2] This holding is in disagreement with this court's holding in *Mraz v. Canadian Universal Insurance Company*, No. 85-2399, slip opinion (4th Cir. Nov. 4, 1986). The parties in this case do not raise the same issue as that presented in *Mraz*, and we therefore decline to base our decision on its holding.

terms *in pari materia*, with the effect of holding that Maryland Casualty had no duty to defend Armco in the *CCC* litigation. Under Maryland law, the insurer has a duty to defend where there is a "possibility" that it may be liable. *Continental Casualty Company v. Board of Education of Charles County*, 302 Md. 516, 489 A.2d 536 (1985). The insurance contract provides that Maryland Casualty will defend any suit against Armco which alleges "such injury, . . . even if such suit is groundless, false, or fraudulent . . . ." Thus, the duty to defend arises only where there is an allegation of "such injury," which phrase refers to the liability of the insurance company to pay on behalf of Armco the sums which Armco will become legally obligated "to pay as damages because of injury to or destruction of property . . . ." It is clear that the duty to defend and the duty to reimburse are to be interpreted conterminously, and because we hold that the claim in the *CCC* litigation does not allege a claim for damages as defined in the policy, then a mere "possibility" of liability on behalf of Maryland Casualty does not arise.

IV

The appellant has offered two other theories. First, the appellant argues that response costs are "mitigation" costs which, because their incursion saves the insurer money for which it would otherwise be liable, are "damages" under the terms of the policy. The appellant cites two cases which it says supports the recoverability of mitigation expenses. *See Consolidated Rail Corporation v. Certain Underwriters at Lloyds*, No. 84-2069, slip opinion (E.D.Pa. June 3, 1986); *Bankers Trust Company v. Hartford Accident and Indemnity Company*, 518 F.Supp. 371 (S.D.N.Y.), *vacated due to settlement*, 621 F.Supp. 685 (S.D.N.Y. 1981). In these cases, however, the court determined that the insurance contract specifically obligated the insurer to reimburse expenses undertaken to mitigate the amount of damages. The appellant has presented no argument that the Maryland Casualty

policy by its terms implies the coverage of such damages. The appellant does argue, as a matter of judicial policy, that the insurer ought to be liable where the insured takes steps to mitigate the damages which would be chargeable to the insurer. Such an interpretation would suffer from the same difficulties attendant in construing Maryland Casualty liable for Armco's (or the government's) employment of prophylactic measures: the insurer would be uncertain of the extent of its liability in the absence of a requirement for an injury, the insured would have the tendency to over-utilize the "free" resource, and the judicial system would be faced with the impossible task of attempting to define the limitations on the necessity for the costs incurred in preventing future harm. We find this argument unpersuasive.

Second, the appellant argues that the action of the district court in Missouri, which assigned a special master to address the same issue but later vacated *nunc pro tunc* its order that adopted the master's recommendations, should have collateral estoppel or preferably res judicata effect in this case. The appellant argues that a defendant should not be able to manipulate the judicial system by entering into last-minute settlements in order to avoid the collateral estoppel effects of unfavorable judgments. *See*, Note, *Collateral Estoppel of Nonparties*, 87 Harv. L. Rev. 1485, 1503 (1974). Regarding the rule that the judgment in the prior suit must be "final" before collateral estoppel can obtain, the appellant cites *Chemetron Corporation v. Business Funds, Inc.*, 682 F.2d 1149, 1191 (5th Cir. 1982), *vacated on other grounds*, 460 U.S. 1007 (1983) (stating that the finality requirement "does not require a judgment 'which ends the litigation . . . and leaves nothing for the court to do but execute the judgment,' *Catlin v. U.S.*, 324 U.S. 229, 233 . . . (1945), but includes many dispositions which, though not final in that sense, have nevertheless been fully litigated").

We decline to hold that the recommendations of a special master, which have been vacated, rise to the level of a "final judgment" in order to estop the present litigation. In light of the significance of the issue presented and the large sums of money involved, and the fact that the manuscript policy was not before the Missouri court, the preclusion against the putative defendant of re-litigation on the grounds of estoppel arising out of withdrawn judgment is singularly inappropriate. *See* Note, *Avoiding Issue Preclusion by Settlement Conditioned upon the Vacatur of Entered Judgments*, 96 Yale L. J. 860 (1987). Collateral estoppel is an equitable doctrine, and we affirm the district court's decision on the equities not to employ it.

Thus the decision of the district court is

AFFIRMED.

FILED
August 4, 1987
U.S. Court of Appeals
Fourth Circuit

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-3125

The Maryland Casualty Company
Appellee,

versus

Armco, Inc.,
Appellant.

On Petition for Rehearing with Suggestion for Rehearing In Banc.

ORDER

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for hearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Chapman, with the concurrence of Judge Widener and Judge Sprouse.

For the Court,

/s/
CLERK

Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA")
42 U.S.C. §9606. Abatement Actions

(a) Maintenance, jurisdiction, etc.

In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

(b) Fines; reimbursement

(1) Any person who, without sufficient cause, willfully violates, or fails or refuses to comply with, any order of the President under subsection (a) of this section may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than $25,000 for each day in which such violation occurs or such failure to comply continues.

(2)(A) Any person who receives and complies with the terms of any order issued under subsection (a) of this section may, within 60 days after completion of the required action, petition the President for reimbursement from the Fund for the reasonable costs of such action, plus interest. Any interest payable under this paragraph shall accrue on the amounts expended from the date of expenditure at the same rate as specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26.

(B) If the President refuses to grant all or part of a petition made under this paragraph, the petitioner may within 30 days of receipt of such refusal file an action against the President in the appropriate United States district court seeking reimbursement from the Fund.

(C) Except as provided in subparagraph (D), to obtain reimbursement, the petitioner shall establish by a preponderance of the evidence that it is not liable for response costs under section 9607(a) of this title and that costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order.

(D) A petitioner who is liable for response costs under section 9607(a) of this title may also recover its reasonable costs of response to the extent that it can demonstrate, on the administrative record, that the President's decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with law. Reimbursement awarded under this subparagraph shall include all reasonable response costs incurred by the petitioner pursuant to the portions of the order found to be arbitrary and capricious or otherwise not in accordance with law.

(E) Reimbursement awarded by a court under subparagraph (C) or (D) may include appropriate costs, fees, and other expenses in accordance with subsections (a) and (d) of section 2412 of Title 28.

(c) Guidelines for using imminent hazard, enforcement, and emergency response authorities; promulgation by Administrator of EPA, scope, etc.

Within one hundred and eighty days after December 11, 1980, the Administrator of the Environmental Protection Agency shall, after consultation with the Attorney General, establish and publish guidelines for using the imminent hazard, enforcement, and emergency response authorities of this section and other existing statutes administered by the Administrator of the Environmental Protection Agency to

effectuate the responsibilities and powers created by this chapter. Such guidelines shall to the extent practicable be consistent with the national hazardous substance response plan, and shall include, at a minimum, the assignment of responsibility for coordinating response actions with the issuance of administrative orders, enforcement of standards and permits, the gathering of information, and other imminent hazard and emergency powers authorized by (1) sections 1321(c)(2), 1318, 1319, and 1364(a) of Title 33, (2) sections 6927, 6928, 6934, and 6973 of this title, (3) sections 300j-4 and 300i of this title, (4) sections 7413, 7414, and 7603 of this title, and (5) section 2606 of Title 15

42 U.S.C. § 9607. Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

(b) Defenses

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could forceably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

(c) Determination of amounts

(1) Except as provided in paragraph (2) of this subsection, the liability under this section of an owner or operator or other responsible person for each release of a hazardous substance or incident involving release of a hazardous substance shall not exceed—

(A) for any vessel, other than an incineration vessel, which carries any hazardous substance as cargo or residue, $300 per gross ton, or $5,000,000, whichever is greater;

(B) for any other vessel, other than an incineration vessel, $300 per gross ton, or $500,000, whichever is greater;

(C) for any motor vehicle, aircraft, pipeline (as defined in the Hazardous Liquid Pipeline Safety Act of 1979 [49 U.S.C.A. § 2001 et seq.]), or rolling stock, $50,000,000 or such lesser amounts as the President shall establish by regulation, but in no event less than $5,000,000 (or, for releases of hazardous substances as defined in section 9601(14)(A) of this title into the navigable waters,

$8,000,000). Such regulations shall take into account the size, type, location, storage, and handling capacity and other matters relating to the likelihood of release in each such class and to the economic impact of such limits on each such class; or

(D) for any incineration vessel or any facility other than those specified in subparagraph (C) of this paragraph, the total of all costs of response plus $50,000,000 for any damages under this subchapter.

(2) Notwithstanding the limitations in paragraph (1) of this subsection, the liability of an owner or operator or other responsible person under this section shall be the full and total costs of response and damages, if (A)(i) the release or threat of release of a hazardous substance was the result of willful misconduct or willful negligence within the privity or knowledge of such person, or (ii) the primary cause of the release was a violation (within the privity or knowledge of such person) of applicable safety, construction, or operating standards or regulations; or (B) such person fails or refuses to provide all reasonable cooperation and assistance requested by a responsible public official in connection with response activities under the national contingency plan with respect to regulated carriers subject to the provisions of Title 49 or vessels subject to the provisions of Title 33 or 46, subparagraph (A)(ii) of this paragraph shall be deemed to refer to Federal standards or regulations.

(3) If any person who is liable for a release or threat of release of a hazardous substance fails without sufficient cause to properly provide removal or remedial action upon order of the President pursuant to section 9604 or 9606 of this title, such person may be liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action. The President is authorized to commence a civil action against any such person to recover the puni-

tive damages, which shall be in addition to any costs recovered from such person pursuant to section 9612(c) of this title. Any moneys received by the United States pursuant to this subsection shall be deposited in the Fund.

(d) Rendering care or advise

(1) In general

Except as provided in paragraph (2), no person shall be liable under this subchapter for costs or damages as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the National Contingency Plan ("NCP") or at the direction of an onscene coordinator appointed under such plan, with respect to an incident creating a danger to public health or welfare or the environment as a result of any releases of a hazardous substance or the threat thereof. This paragraph shall not preclude liability for costs or damages as the result of negligence on the part of such person.

(2) State and local governments

No State or local government shall be liable under this subchapter for costs or damages as a result of actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person. This paragraph shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the State or local government. For the purpose of the preceding sentence, reckless, willful, or wanton misconduct shall constitute gross negligence.

(3) Savings provision

This subsection shall not alter the liability of any person covered by the provisions of paragraph (1), (2), (3) or (4) of subsection (a) of this section with respect to the release or threatened release concerned.

(e) Indemnification, hold harmless, etc.; agreements or conveyances; subrogation rights

(1) No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

(2) Nothing in this subchapter, including the provisions of paragraph (1) of this subsection, shall bar a cause of action that an owner or operator or any other person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.

(f) Actions involving natural resources; maintenance, scope, etc.

(1) Natural resources liability; use of recovered funds; measure of damages; double recovery

In the case of an injury to, destruction of, or loss of natural resources under subparagraph (C) of subsection (a) of this section liability shall be to the United States Government and to any State for natural resources within the State or belonging to, managed, by, controlled by, or appertaining to such State: *Provided, however*, That no liability to the United States or State shall be imposed under subparagraph (C) of subsection (a) of this section, where the party sought to be charged has demonstrated that the damages to natural resources complained of were specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement, or other comparable environment analysis, and the decision to grant a permit or license authorizes such commitment of natural resources, and the facility or project was otherwise operating within the terms of its permit or license. The President, or the authorized representative of any State, shall act on behalf of the

public as trustee of such natural resources to recover for such damages. Sums recovered by the United States Government as trustee under this subsection shall be retained by the trustee, without further appropriation, for use only to restore, replace, or acquire the equivalent of such natural resources. Sums recovered by a State as trustee under this subsection shall be available for use only to restore, replace, or acquire the equivalent of such natural resources by the State. The measure of damages in any action under subparagraph (C) of subsection (a) of this section shall not be limited by the sums which can be used to restore or replace such resources. There shall be no double recovery under this chapter for natural resource damages, including the costs of damage assessment or restoration, rehabilitation, or acquisition for the same release and natural resource. There shall be no recovery under the authority of subparagraph (C) of subsection (a) of this section where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before December 11, 1980.

(2) Designation of Federal and State officials

(A) Federal

The President shall designate in the National Contingency Plan published under section 9605 of this chapter the Federal officials who shall act on behalf of the public as trustees for natural resources under this chapter and section 1321 of Title 33. Such officials shall assess damages for injury to, destruction of, or loss of natural resources for purposes of this chapter and such section 1321 of Title 33 for those resources under their trusteeship and may, upon request of and reimbursement from a State and at the Federal officials' discretion, assess damages for those natural resources under the State's trusteeship.

(B) State

The Governor of each State shall designate State officials who may act on behalf of the public as trustees for

natural resources under this chapter and section 1321 of Title 33 and shall notify the President of such designations. Such State officials shall assess damages to natural resources for the purposes of this chapter and such section 1321 of Title 33 for those natural resources under their trusteeship.

(C) Rebuttable presumption

Any determination or assessment of damages to natural resources for the purposes of this chapter and section 1321 of Title 33 made by a Federal or State trustee in accordance with the regulations promulgated under section 9651 of this title shall have the force and effect of a rebuttable presumption on behalf of the trustee in any administrative or judicial proceeding under this chapter or section 1321 of Title 33.

(g) Federal agencies

For provisions relating to Federal agencies, see section 9620 of this title.

(h) Owner or operator of vessel

The owner or operator of a vessel shall be liable in accordance with this section, under maritime tort law, and as provided under section 9614 of this title notwithstanding any provision of the Act of March 3, 1851 (46 U.S.C. 183ff) or the absence of any physical damage to the proprietary interest of the claimant.

(i) Application of registered pesticide produce

No person (including the United States or any State or Indian tribe) may recover under the authority of this section for any response costs or damages resulting from the application of a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act [7 U.S.C.A. § 136 et seq.]. Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a

release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of such hazardous substance.

(j) Obligations or liability pursuant to federally permitted release

Recovery by any person (including the United States or any State or Indian tribe) for response costs or damages resulting from a federally permitted release shall be pursuant to existing law in lieu of this section. Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of such hazardous substance. In addition, costs of response incurred by the Federal Government in connection with a discharge specified in section 9601(10)(B) or (C) of this title shall be recoverable in an action brought under section 1319(b) of Title 33.

(k) Transfer to, and assumption by, Post-Closure Liability Fund of liability of owner or operator of hazardous waste disposal facility in receipt of permit under applicable solid waste disposal law; time, criteria applicable, procedures, etc.; monitoring costs; reports

(1) The liability established by this section or any other law for the owner or operator of a hazardous waste disposal facility which has received a permit under subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.], shall be transferred to and assumed by the Postclosure Liability Fund, established by section 9641 of this title when—

(A) such facility and the owner and operator thereof has complied with the requirements of subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.] ad regulations issued thereunder, which may affect the performance of such facility after closure; and

(B) such facility has been closed in accordance with such regulations and the conditions of such permit, and such facility and the surrounding area have been monitored as required by such regulations and permit conditions for a period not to exceed five years after closure to demonstrate that there is no substantial likelihood that any migration offsite or release from confinement of any hazardous substance or other risk to public health or welfare will occur.

(2) Such transfer of liability shall be effective ninety days after the owner or operator of such facility notifies the Administrator of the Environmental Protection Agency (and the State where it has an authorized program under section 3006(b) of the Solid Waste Disposal Act [42 U.S.C.A. § 6926(b)]) that the conditions imposed by this subsection have been satisfied. If within such ninety-day period the Administrator of the Environmental Protection Agency or such State determines that any such facility has not complied with all the conditions imposed by this subsection or that insufficient information has been provided to demonstrate such compliance, the Administrator or such Stae shall so notify the owner and operator of such facility and the administrator of the Fund established by section 9641 of this title, and the owner and operator of such facility shall continue to be liable with respect to such facility under this section and other law until such time as the Administrator and such State determines that such facility has complied with all conditions imposed by this subsection. A determination by the Administrator or such State that a facility has complied with all conditions imposed by this subsection or that insufficient information has been supplied to demonstrate compliance, shall be a final administrative action for purposes of judicial review. A request for additional information shall state in specific terms the data required.

(3) In addition to the assumption of liability of owners and operators under paragraph (1) of this subsection, the Post-closure Liability Fund established by section 9641 of this title may be used to pay costs of monitoring and care and

maintenance of a site incurred by other persons after the period of monitoring required by regulations under subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.] for hazardous waste disposal facilities meeting the conditions of paragraph (1) of this subsection.

(4)(A) Not later than one year after December 11, 1980, the Secretary of the Treasury shall conduct a study and shall submit a repor thereon to the Congress on the feasibility of establishing or qualifying an optional system of private insurance for postclosure financial responsibility for hazardous waste disposal facilities to which this subsection applies. Such study shall include a specification of adequate and realistic minimum standards to assure that any such privately placed insurance will carry out the purposes of this subsection in a reliable, enforceable, and practical manner. Such a study shall include an examination of the public and private incentives, programs, and actions necessary to make privately placed insurance a practical and effective option to the financing system for the Post-closure Liability Fund provided in subchapter II of this chapter.

(B) Not later than eighteen months after December 11, 1980, and after a public hearing, the President shall by rule determine whether or not it is feasible to establish or qualify an optional system of private insurance for postclosure financial responsibility for hazardous waste disposal facilities to which this subsection applies. If the President determines the establishment or qualification of such a system would be infeasible, he shall promptly publish an explanation of the reasons for such a determination. If the President determines the establishment or qualification of such a system woud be feasible, he shall promptly publish notice of such determination. Not later than six months after an affirmative determination under the preceding sentence and after a public hearing, the President shall by rule promulgate adequate and realistic minimum standards which must be met by any such privately placed insurance, taking into account the purposes of this chapter and this subsection. Such rules shall also specify reasonably expeditious proce-

dures by which privately placed insurance plans can qualify as meeting such minimum standards.

(C) In the event any privately placed insurance plan qualifies under subparagraph (B), any person enrolled in, and complying with the terms of, such plan shall be excluded from the provisions of paragraphs (1), (2), and (3) of this subsection and exempt from the requirements to pay any tax or fee to the Post-closure Liability Fund under subchapter II of this chapter.

(D) The President may issue such rules and take such other actions as are necessary to effectuate the purposes of this paragraph.

(5) *Suspension of liability transfer.*

Notwithstanding paragraphs (1), (2), (3), and (4) of this subsection and subsection (j) of section 9611 of this title, no liability shall be transferred to or assumed by the Post-Closure Liability Trust Fund established by section 9641 of this title prior to completion of the study required under paragraph (6) of this subsection, transmission of a report of such study to both Houses of Congress, and authorization of such a transfer or assumption by Act of Congress following receipt of such study and report.

(6) *Study of Options for Post-closure Program.*

(A) *Study.*

The Comptroller General shall conduct a study of options for a program for the management of the liabilities associated with hazardous waste treatment, storage, and disposal sites after their closure which complements the policies set forth in the Hazardous and Solid Waste Amendments of 1984 [42 U.S.C.A. § 6901 note] and assures the protection of human health and the environment.

(B) *Program Elements.*

The program referred to in subparagraph (A) shall be designed to assure each of the following:

(i) Incentives are created and maintained for the safe management and disposal of hazardous wastes so as to assure protection of human health and the environment.

(ii) Members of the public will have reasonable confidence that hazardous wastes will be managed and disposed of safely and that resources will be available to address any problems that may arise and to cover costs of long-term monitoring, care, and maintenance of such sites.

(iii) Persons who are or seek to become owners and operators of hazardous waste disposal facilities wil be able to manage their potential future liabilities and to attract the investment capital necessary to build, operate, and close such facilities in a manner which assures protection of human health and the environment.

(C) *Assessments.*

The study under this paragraph shall include assessments of treatment, storage, and disposal facilities which have been or are likely to be issued a permit under section 3005 of the Solid Waste Disposal Act [42 U.S.C.A. § 6925] and the likelihood of future insolvency on the part of owners and operators of such facilities. Separate assessments shall be made for different classes of facilities and for different classes of land disposal facilities and shall include but not be limited to—

(i) the current and future financial capabilities of facility owners and operators;

(ii) the current and future costs associated with facilities, including the costs of routine monitoring and maintenance, compliance monitoring, corrective action, natural resource damages, and liability for damages to third parties; and

(iii) the availability of mechanisms by which owners and operators of such facilities can assure that current and future costs, including post-closure costs, will be financed.

(D) *Procedures.*

In carrying ou the responsibilities of this paragraph, the Comptroller General shall consult with the Administrator, the Secretary of Commerce, the Secretary of the Treasury, and the heads of other appropriate Federal agencies.

(E) *Consideration of Options.*

In conducting the study under this paragraph, the Comptroller General shall consider various mechanisms and combinations of mechanisms to complement the policies set forth in the Hazardous and Solid Waste Amendments of 1984 [42 U.S.C.A. § 6901 note] to serve the purposes set forth in subparagraph (B) and to assure that the current and future costs associated with hazardous waste facilities, including post-closure costs, will be adequately financed and, to the greatest extent possible, borne by the owners and operators of such facilities. Mechanisms to be considered include, but are not limited to—

(i) revisions to closure, post-closure, and financial responsibility requirements under subtitles C and I of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq. and § 6991 et seq.];

(ii) voluntary risk pooling by owners and operators;

(iii) legislation to require risk pooling by owners and operators;

(iv) modification of the Post-Closure Liability Trust Fund previously established by section 9641 of this title, and the conditions for transfer of liability under this subsection, including limiting the transfer of some or all liability under this subsection only in the case of insolvency of owners and operators;

(v) private insurance;

(vi) insurance provided by the Federal Government;

(vii) coinsurance, reinsurance, or pooled-risk insurance, whether provided by the private sector or provided or assisted by the Federal Government; and

(viii) creation of a new program to be administered by a new or existing Federal agency or by a federally chartered corporation.

(F) *Recommendations.*

The Comptroller General shall consider options for funding any program under this section and shall, to the extent necessary, make recommendations to the appropriate committees of Congress for additional authority to implement such program.

(L) *Federal Lien.*

(1) *In General.*

All costs and damages for which a person is liable to the United States under subsection (a) of this section (other than the owner or operator of a vessel under paragraph (1) of this subsection (a) of this section) shall constitute a lien in favor of the United States upon all real property and rights to such property which—

(A) belong to such person; and

(B) are subject to or affected by a removal or remedial action.

(2) *Duration.*

The lien imposed by this subsection shall arise at the later of the following:

(A) The time costs are first incurred by the Unitesd States with respect to a response action under this chapter.

(B) The time that the person referred to in paragraph (1) is provided (by certified or registered mail) written notice of potential liability.

Such lien shall continue until the liability for the costs (or a judgment against the person arising out of such liability) is satisfied or becomes unenforceable through operation of the statute of limitations provided in section 9613 of this title.

(3) *Notice and Validity.*

The lien imposed by this subsection shall be subject to the rights of any purchaser, holder of a security interest, or judgment lien creditor whose interest is perfected under applicable State law before notice of the lien has been filed in the appropriate office within the State (or county or other governmental subdivision), as designated by State law, in which the real property subject to the lien is located. Any such purchaser, holder of a security interest, or judgment lien creditor shall be afforded the same protections against the lien imposed by this subsection as are afforded under state law against a judgment lien which arises out of an unsecured obligation and which arises as of the time of the filing of the notice of the lien imposed by this subsection. If the State has not by law designated one office for the receipt of such noties of liens, the notice shall be filed in the office of the clerk of the United States district court for the district in which the real property is located. For purposes of this subsection, the terms "purchaser" and "security interest" shall have the definitions provided under section 6323(h) of Title 26.

(4) *Action in Rem.*

The costs constituting the lien may be recovered in an action in rem in the United States district court for the district in which the removal or remedial action is occurring or has occurred. Nothing in this subsection shall affect the right of the United States to bring an action against any person to recover all costs and damages for which such person is liable under subsection (a) of this section.

(M) *Maritime Lien.*

All costs and damages for which the owner or operator of a vessel is liable under subsection (a)(1) of this section with respect to a release or threatened release from such vessel shall constitute a maritime lien in favor of the United States on such vessel. Such costs may be recovered in an action in rem in the district court of the United States for the district in which the vessel may be found. Nothing in this subsection shall affect the right of the United States to bring an action against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs.

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No. 87-744

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

ARMCO, INC.,
Petitioner,

v.

THE MARYLAND CASUALTY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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December 9, 1987

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether, under Maryland common law, the United States Court of Appeals for the Fourth Circuit sitting in diversity correctly determined that the terms of a 158-page insurance contract afforded no coverage for a lawsuit seeking equitable injunctive and restitutionary relief pursuant to the Comprehensive Environmental Response, Compensation and Liability Act and the Resource Conservation and Recovery Act?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-744

ARMCO, INC.,

Petitioner,

v.

THE MARYLAND CASUALTY COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This is a declaratory judgment action between two large corporations brought under the district court's diversity jurisdiction. It requires the interpretation of a 158-page, hand-crafted insurance agreement negotiated between The Maryland Casualty Company ("Maryland Casualty")[1] and Armco, Inc. ("Armco"). The insurance

[1] The following list of parent companies, subsidiaries, and affiliates of The Maryland Casualty Company is submitted in accordance with Supreme Court Rule 28.1: Assurance Company of America; American General Fire and Casualty Company; Maine Bonding

contract was in effect, as modified from time to time, from 1966 until June 1, 1983. (App. 13.) Over the policy period, nineteen expert Armco corporate officials, including several full-time insurance specialists, participated with Maryland Casualty negotiators in refining the policy's terms, many of which were specifically developed by the parties.[2]

The resulting manuscript insurance agreement provides, in pertinent part, that Maryland Casualty will "pay on behalf of the insured all sums which the insured shall become legally obligated to pay *as damages*" because of bodily injury or property damage. (App. 13 (emphasis added).) Maryland Casualty also agreed to "defend any suit against the insured alleging such injury, sickness, disease or destruction *and seeking damages* on account thereof." (*Id.*)

In 1982, the United States sued Armco and others, alleging that they had caused an "endangerment to health, welfare or the environment" at a waste disposal site owned and operated by Conservation Chemical Company ("CCC"). First Amended Complaint ¶ 1, *United States v. Conservation Chem. Co.*, No. 82-0983-CV-W-5 (W.D. Mo.) ("*CCC*"). Paragraph 1 of the government's complaint stated:

> This is a civil action brought by the United States under Section 7003 of the Resource Conservation and Recovery Act ("RCRA") and Section 106 of the

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and Casualty Company; Maryland Insurance Company (Life); National Property Owners; Northern Insurance Company of New York; National Standard Insurance Company; Steadfast Insurance Company; and Valiant Insurance Company.

[2] A major insurance broker also aided Armco throughout the bargaining process. Armco itself is the 39th largest casualty insurer in the United States, with a multi-company insurance operation. *See* Joint Appendix at 370-71, 409, 413, 420-57, in *Maryland Casualty Co. v. Armco, Inc.*, No. 86-3125 (4th Cir. filed Sept. 24, 1986).

> Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") *for injunctive relief* to remedy a condition which may present an imminent and substantial endangerment to health, welfare or the environment . . . .

(Emphasis added; citations omitted.) The government also sought under RCRA Section 7003 and CERCLA Sections 104 and 107(a) "reimbursement of investigative and other expenses" it incurred at the site. *Id.*

When Armco asked Maryland Casualty to provide insurance coverage for the *CCC* suit, Maryland Casualty promptly declined, advising on several grounds that no such obligation arose under the parties' insurance agreement. Joint Appendix at 292-93, *Maryland Casualty Co. v. Armco, Inc.*, No. 86-3125 (4th Cir. filed Sept. 24, 1986). One reason cited by Maryland Casualty was the absence of coverage for suits that did not "seek[] damages" and for sums that were not payable "as damages." *Id.*

To obtain certainty as to its obligations, Maryland Casualty brought this action against Armco in the United States District Court for the District of Maryland, invoking that court's diversity jurisdiction. The parties filed cross-motions for summary judgment, raising a number of questions concerning the interpretation of their carefully structured agreement. They agreed, however, that, under the applicable choice-of-law rules, Maryland law controlled the interpretation of the insurance contract. 643 F. Supp. at 431 (App. 2-3).

On September 8, 1986, the district court entered summary judgment for Maryland Casualty, ruling that no coverage existed because the *CCC* suit did not seek "damages" within the meaning of the Maryland Casualty-Armco insurance agreement. Relying on an unbroken line of authority, it found the government's claim in *CCC* to be equitable. 643 F. Supp. at 435 (App. 9). The dis-

trict court also found that the State of Maryland's "[b]lack letter insurance law holds that claims for equitable relief are not claims for 'damages' under liability contracts." 643 F. Supp. at 432 (App. 3). Concluding that "Maryland Casualty is entitled to the benefit of its bargain," *id.* at 435 (App. 9), the district court granted it summary judgment.

The United States Court of Appeals for the Fourth Circuit unanimously affirmed. 822 F.2d 1348 (1987) (App. A-11 to A-24). It found the district court's decision consistent with the settled law of Maryland, the terms of the parties' negotiated insurance agreement, and public policy supporting enforcement of the contract as written. The Fourth Circuit also held that the district court had correctly concluded that the *CCC* suit sought equitable injunctive and restitutionary relief, and not damages. 822 F.2d at 1352 (App. 18). The Fourth Circuit denied Armco's motion for rehearing, with suggestion for rehearing *en banc*. No judge of that Court supported the request for *en banc* rehearing. (App. 25.)

Armco then petitioned for a writ of certiorari, seeking review in this Court of the Fourth Circuit's ruling.

SUMMARY OF ARGUMENT

The writ should be denied. This diversity case presents a state law question of private contract interpretation, over which the exercise of this Court's certiorari power is neither appropriate nor necessary. The interpretation under Maryland law of the terms of the parties' negotiated insurance policy is far removed from the role of this Court.

Armco attempts to by-pass the traditional rule that this Court will not review federal appellate decisions on questions of state law. It argues that the Fourth Circuit's decision frustrates federal policy embodied in

CERCLA [3] and RCRA [4] and that a uniform, federal rule should therefore be imposed.

Armco cannot transform a dispute under state contract and insurance law into an issue for this Court. In substance, it asks for this Court's discretionary review solely on the basis of its assertion that, without insurance coverage, "[s]ite operators and generators will be forced to bear the entire cost of remediation" at various hazardous waste sites. Petition at 6. According to Armco, that hypothetical development might thwart national policy embodied in CERCLA and RCRA. In reality, national environmental enforcement efforts—which seek to force industrial companies to internalize the costs of hazardous waste disposal—are promoted, not thwarted, by even-handed application of existing state law insurance rules. Armco simply aspires to evade its CERCLA and RCRA liability by shifting it to a "deep pocket."

Nor is it appropriate to create a uniform, federal rule simply because the application of diverse state law rules may result in different outcomes. This Court recognized and accepted that obvious fact in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 75 (1938), which foreclosed federal courts in diversity cases from "promot[ing] uniformity of law throughout the United States." Armco's objection to the potential for varying results under state law governing insurance coverage cases challenges the fundamental principles established by *Erie*.[5] It is singu-

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[3] Comprehensive Environmental Response, Compensation, and Liability Act of 1980, *as amended*, 42 U.S.C. §§ 9601-75.

[4] Resource Conservation and Recovery Act of 1976, *as amended*, 42 U.S.C. §§ 6901-91.

[5] For this reason, Armco's efforts to portray the outcome here as inconsistent with that of a divided panel opinion in another circuit in a case currently on rehearing *en banc* is unavailing. Armco concedes that Maryland law controls this case and that Missouri law controls the dispute now pending *en banc* before the Eighth Circuit. *See Continental Ins. Cos. v. Northeastern Pharm. & Chem. Co.*, 811 F.2d 1180, *reh'g en banc granted*, 815 F.2d 51 (8th Cir. 1987).

larly inappropriate in the context of an insurance dispute. National policy, as reflected in the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15, is that the "business of insurance" is to be regulated by state law. Indeed, in numerous respects, insurance law varies significantly from state to state.

Armco's final effort to fashion an issue worthy of certiorari is equally unavailing. It attempts to turn this private insurance coverage case into an action to overturn basic law governing the construction of government CERCLA and RCRA claims. Only one federal statutory question is even in the background of this contract dispute: whether the *CCC* suit is one seeking damages. Every court to consider that question—and there have been dozens—has held that RCRA and CERCLA claims for injunctive relief and restitution of response costs are equitable and do not constitute suits for damages. The Court denied certiorari earlier this year in a case brought by the United States that squarely presented that question. *United States v. Northeastern Pharmaceutical & Chemical Co.*, 108 S. Ct. 146 (1987). Armco suggests no reason to revisit that settled determination now in the anomolous context of a private contract dispute. There is none.

THE WRIT SHOULD BE DENIED

A. THE INTERPRETATION UNDER STATE LAW OF A MANUSCRIPT INSURANCE POLICY NEGOTIATED BETWEEN TWO SOPHISTICATED PRIVATE PARTIES IS NOT AN ISSUE WARRANTING CERTIORARI.

This is a diversity case in which the United States Court of Appeals for the Fourth Circuit and the United States District Court for the District of Maryland interpreted under Maryland law the terms of a manuscript insurance agreement negotiated between Armco and Maryland Casualty. Both courts below expressly grounded their decisions on the insurance law of the State of Maryland. *Maryland Casualty Co. v. Armco,*

Inc., 822 F.2d 1348, 1352 (4th Cir. 1987) (App. 17), *aff'g* 643 F. Supp. 430, 431 (D. Md. 1986) (App. 2). All four of the judges to consider the case reached the same result.

This Court repeatedly has stressed that its role is not to review federal appellate court decisions on matters of state law.[6] *E.g.*, *Pierson v. Ray*, 386 U.S. 547, 558 n.12 (1967); *Huddleson v. Dwyer*, 322 U.S. 232, 237 (1944). There is no reason to depart from that traditional rule here. A decision by this Court interpreting the Maryland Casualty-Armco insurance contract under Maryland law would not bind other states or other litigants. In fact, the Court consistently has denied certiorari in insurance coverage disputes governed by state law and arising in diversity cases.[7] Under the Court's longstanding approach, this case plainly does not warrant certiorari.

B. ARMCO'S SUGGESTION THAT ENFORCEMENT OF INSURANCE AGREEMENTS UNDER SETTLED STATE LAW SOMEHOW FRUSTRATES NATIONAL POLICY EMBODIED IN CERCLA OR RCRA IS WHOLLY WITHOUT MERIT OR SUBSTANCE.

Recognizing that the Court's traditional refusal to review state law issues bars certiorari on this case's cen-

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[6] Unlike its predecessor Rule 19, the current version of this Court's Rule 17 provides no basis for granting certiorari if a court of appeals' decision resolves "an important State or territorial question in a way in conflict with applicable state or territorial law."

[7] *E.g.*, *Eli Lilly & Co. v. Home Ins. Co.*, 794 F.2d 710 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 940 (1987); *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12 (1st Cir. 1982), *cert. denied*, 460 U.S. 1028 (1983); *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982); *Porter v. American Optical Corp.*, 641 F.2d 1128 (5th Cir.), *cert. denied*, 454 U.S. 1009 (1981); *Insurance Co. of N. Am. v. Forty-Eight Insulations*, 633 F.2d 1212 (6th Cir. 1980), *cert. denied*, 454 U.S. 1109 (1981).

tral question, Armco complains of a purported conflict between state insurance law and national policy embodied in CERCLA and RCRA.

The essence of Armco's complaint is its speculation that, under the decisions of the courts below applying the terms of the contract and Maryland law, "[s]ite operators and generators will be forced to bear the entire cost of remediation" at various hazardous waste sites. Petition at 6. Armco claims that this result "frustrates federal policy embodied in CERCLA." Petition at 7, n.2. It therefore urges this Court to impose "a national, uniform rule" superseding state law principles governing insurance contract interpretation. *Id.*

This is a blatant invitation to judicial social engineering. Armco asks this Court to dispense with the terms of contracts and with contract law standards in order to aid hazardous waste generators in evading the costs of their polluting activities. Under Armco's proposed approach, no contract provision and no state insurance law principle whose application restricted insurance coverage for a CERCLA or RCRA claim would survive. Instead, a "national, uniform rule" would afford the polluter a "free-ride" of coverage that is outside its policy's terms as construed under settled state insurance law rules.

No national policy embodied in CERCLA or RCRA compels—or, indeed, even supports—such a remarkable result. Federal enforcement efforts under environmental laws are in no way prejudiced by the even-handed application of state law to insurance contract disputes. As the Ninth Circuit stressed in *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1459 (9th Cir. 1986), "all responsible parties will be fully liable [under those statutes] to the government regardless of the indemnification contracts they have entered into." Insurance agreements "are essentially tangential to the enforcement of CERCLA's liability provisions" because they "cannot

alter or excuse the underlying liability of responsible parties." *Id.*[8] *See also* CERCLA Section 107(e)(1) (avoidance of liability to the government through private risk-shifting agreements prohibited, but such agreements are otherwise permitted and preserved). In enacting CERCLA and RCRA, Congress's intent was to force industrial companies to internalize the costs of hazardous waste disposal.[9] That goal is promoted by fulfilling the intentions of the parties through the straightforward application of their contracts' terms and related state law rules.[10]

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[8] *Mardan* refused to supersede state law with a uniform federal rule governing the interpretation of contractual arrangements apportioning CERCLA liability between private responsible parties. 804 F.2d at 1457-60. In addition to the considerations noted above, the Ninth Circuit recognized that application of a federal rule to such agreements "would disrupt commercial relationships predicated on state law." *Id.* at 1460.

[9] As the Senate Report explains, Congress designed CERCLA to "assur[e] that those who benefit financially from a commercial activity internalize the health and environmental costs of that activity into the costs of doing business." S. Rep. No. 848, 96th Cong., 2d Sess. 13 (1980). *See also United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726, 734 (8th Cir. 1986) (Congress "impos[ed] liability for the cost of cleaning up such sites upon those parties who created and profited from the sites and upon the chemical industrial as a whole"), *cert. denied*, 108 S. Ct. 146 (1987); *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1455 (9th Cir. 1986) (CERCLA was designed to "assure that the parties responsible for hazardous substances bore the costs of remedying the conditions they created"); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986) ("Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created" (quoting *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982)).

[10] When, as here, environmental insurance coverage issues arise under a general liability policy, the parties clearly expect to be governed by state law. General liability insurance policies encom-

Armco complains that state law may produce varying results. In our federal system, that is of course the intended result. Different outcomes necessarily result from the application of diverse state law rules. This Court's ruling in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 75 (1938), recognized that circumstance. *Erie*, which requires a federal court sitting in diversity jurisdiction to apply the law of the state in which it sits, has long been held applicable to insurance cases. *E.g., Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202 (1938); *see generally* 2 G. Couch, *Couch on Insurance 2d* § 16:54 (2d rev. ed. 1984). The application of state law to insurance coverage disputes, and with it the concommitant potential for different outcomes under different state law rules, is also consistent with national policy reflected in the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15, under which the states are accorded primary power to regulate the business of insurance. Interpreting that Act, this Court has found the "business of insurance" to encompass the interpretation and enforcement of insurance policy terms. *SEC v. National Securities, Inc.*, 393 U.S. 453, 460 (1969).[11]

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pass a variety of risks, including the potential for claims arising from product liability, industrial explosions, equipment failures affecting non-employees, and the like. Those policies historically have been construed under state law for all risks.

[11] The interpretation of an insurance contract is not somehow transformed into a federal law issue simply because the underlying claim for which coverage is sought arises under a federal statute. Insurance coverage disputes often involve claims brought under a broad range of federal statutes. Both federal and state courts consistently have applied state common law rules to them. *E.g., Haines v. St. Paul Fire & Marine Ins. Co.*, 428 F. Supp. 435 (D. Md. 1977) (SEC enforcement action); *Crist v. Insurance Co. of N. Am.*, 529 F. Supp. 601 (D. Utah 1982) (civil rights action under 42 U.S.C. § 1983); *Maryland Cas. Co. v. Economy Bookbinding Corp. Pension Plan & Trust*, 621 F. Supp. 410 (D.N.J. 1985) (ERISA claims); *Stargatt v. Avenell*, 434 F. Supp. 234 (D. Del. 1977) (securities

In a decision issued within a week of *Erie*, this Court recognized in the specific context of an insurance coverage dispute that:

> As to questions controlled by state law, . . . conflict among the circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts.

Ruhlin v. New York Life Ins. Co., 304 U.S. 202, 206 (1938). Despite the permissibility of such conflict, Armco makes much of cases with outcomes it characterizes as irreconcilable with the Fourth Circuit's ruling. In particular, it portrays as inconsistent with the Fourth Circuit's ruling a decision by a divided panel of the Eighth Circuit in a case now pending on rehearing *en banc*. *Continental Ins. Cos. v. Northeastern Pharm. & Chem. Co.*, 811 F.2d 1180, *reh'g en banc granted*, 815 F.2d 51 (8th Cir. 1987). Armco concedes that "technically no dispute of law between the Fourth Circuit and the Eighth Circuit exists at present," Petition at 13, n.4, but simultaneously implies that disagreement is inevitable. Initially, it is, of course, far from clear that a "conflict," even in the imprecise sense that Armco suggests, will exist when the Eighth Circuit issues its *en banc* decision. More fundamentally, even should the full Eighth Circuit reiterate the 2-1 panel decision, that would at most indicate that Maryland and Missouri law differ. This would be the situation *Erie* envisioned and hardly a basis for certiorari.

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fraud claims); *CNA Casualty v. Seaboard Sur. Co.*, 176 Cal. App. 3d 598, 222 Cal. Rptr. 276 (1986) (antitrust claims); *Illinois Farmers Ins. Co. v. Preston*, 1987-88 Fire & Casualty Cas. (CCH) 27 (Ill. App. Ct. 1987) (civil rights action under 42 U.S.C. § 1983); *Hartford Acc. & Indem. Co. v. Village of Hempstead*, 48 N.Y.2d 218, 397 N.E.2d 737, 422 N.Y.S.2d 47 (1979) (civil rights action under 42 U.S.C. § 1983).

The Fourth Circuit's decision is firmly grounded on applicable state insurance law. Settled insurance rules reflected in Maryland law, as in the law of most other jurisdictions, support the result reached by the courts below.[12] Published opinions by four state supreme courts,[13] intermediate appellate courts in six other states,[14] and, in addition to the ruling in this case, six

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[12] *See generally* A. Windt, *Insurance Claims and Disputes* § 4.14 (1982) (injunctive relief and restitutionary relief requiring monetary payments are not regarded as damages within the meaning of liability insurance contracts).

[13] *Desrochers v. New York Cas. Co.*, 99 N.H. 129, 106 A.2d 196, 198-99 (1954) (no coverage for costs of complying with mandatory injunction); *O'Neill Investigations, Inc. v. Illinois Employers Ins.*, 636 P.2d 1170, 1177 (Alaska 1981) (no coverage for suit for injunctive relief and restitution); *Seaboard Sur. Co. v. Ralph Williams' Northwest Chrysler Plymouth, Inc.*, 81 Wash. 2d 740, 504 P.2d 1139, 1143 (1973) (*en banc*) (no coverage for suit for injunctive relief and restitution); *City of Thief River Falls v. United Fire & Cas. Co.*, 336 N.W.2d 274, 275-76 (Minn. 1983) (no coverage for suit seeking mandamus).

[14] *Jaffe v. Cranford Ins. Co.*, 168 Cal. App. 3d 930, 214 Cal. Rptr. 567, 570 (1985) (no coverage for suit seeking restitutionary payment); *Garden Sanctuary, Inc. v. Insurance Co. of N. Am.*, 292 So. 2d 75, 77 (Fla. Dist. Ct. App. 1974) (no coverage for equitable claims for restoration of cemetery); *Board of Ed. v. Country Mut. Ins. Co.*, 121 Ill. App. 3d 124, 459 N.E.2d 273 (1984) (no coverage in suit for writ of mandamus and injunctive relief); *Ladd Constr. Co. v. Insurance Co. of N. Am.*, 73 Ill. App. 3d 43, 391 N.E.2d 568, 573 (1979) (no coverage for suit seeking injunction directing insured to remove debris encroaching on railroad's right-of-way); *Gulf & Western Indus., Inc. v. Seaboard Sur. Co.*, 100 A.D.2d 820, 474 N.Y.S.2d 754, 755 (1st Dep't 1984) (no coverage for costs of complying with injunctive provisions of consent judgment); *Township of Jackson v. American Home Assur. Co.*, No. A-170-81T3 (N.J. Super. Ct. App. Div. Mar. 24, 1982) (finding a duty to defend because underlying suit sought compensatory damages as well as equitable relief); *see also International Mineral & Chem. Co. v. Liberty Mut. Ins. Co.*, No. 84-L-50979 (Cir. Ct., Cook County, Ill. Jan. 6, 1987) (no coverage for equitable CERCLA claims); *CPS Chem. Co. v. Continental Ins. Co.*, No. L-060537-84 (N.J. Super. Ct. March 11, 1987) (no coverage for costs of comply-

other federal courts,[15] including the United States District Court for the District of Maryland,[16] support the finding, as expressed by the district court, that "[b]lack letter insurance law holds that claims for equitable relief are not claims for 'damages' under liability insurance contracts." 643 F. Supp. at 432 (App. 3). Far from departing from settled legal standards and thereby thwarting the objectives of the federal environmental laws, the courts below have followed traditional insurance law found both in Maryland and elsewhere.

C. THE ONLY FEDERAL STATUTORY QUESTION THAT UNDERLIES THE INSURANCE CONTRACT DISPUTE IS SETTLED BY AN UNBROKEN LINE OF AUTHORITY AND, AS THIS COURT RECENTLY RECOGNIZED, IS NOT WORTHY OF CERTIORARI.

The only federal statutory question underlying this insurance contract dispute is whether government RCRA

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ing with injunction compelling environmental cleanup); *Protective Nat'l Ins. Co. v. Union Oil Co.*, No. C-514-463 (Cal. Super. Ct. Oct. 29, 1987) (no coverage for equitable CERCLA claims).

[15] *Aetna Cas. & Sur. Co. v. Henna*, 224 F.2d 499 (5th Cir. 1955) (no coverage for suit seeking injunctive relief); *Board of County Comm'rs v. Guarantee Ins. Co.*, 90 F.R.D. 405, 408 (D. Colo. 1981) (no coverage for attorneys fees in suit for declaratory and injunctive relief); *Haines v. St. Paul Fire & Marine Ins. Co.*, 428 F. Supp. 435, 443 (D. Md. 1977) (no coverage for suit for injunctive relief, restitution and disgorgement); *see also Battisti v. Continental Cas. Co.*, 406 F.2d 1318, 1320 n.2 (5th Cir. 1969) (noting limitation on coverage to suits "seeking damages" in case where complaint amended to add prayer for damages); *Crist v. Insurance Co. of N. Am.*, 529 F. Supp. 601, 604, 606 (D. Utah 1982) (insurers' contractual duties extend to damage claims and "not to claims seeking an injunctive form of relief"); *County of Suffolk v. Royal Globe Ins. Co.*, 1981 Fire & Casualty Cas. (CCH) 1457, 1459 (E.D.N.Y. 1981) (finding a duty to defend because underlying suit principally sought compensatory damages, not injunctive relief).

[16] *Haines v. St. Paul Fire & Marine Ins. Co.*, 428 F. Supp. 435, 443 (D. Md. 1977).

and CERCLA claims for injunctive relief and restitution of response costs constitute claims for damages. This has not proven to be a difficult question. An unbroken line of authority holds that those claims are equitable. Recognizing the absence of any need to review that unanimous conclusion, this Court refused certiorari earlier this year in a government case squarely presenting that question. *See United States v. Northeastern Pharm. & Chem. Co.*, 108 S. Ct. 146 (1987). In deciding this private contract case, the courts below merely accepted this now-established determination as the premise of their contract analysis.

Under RCRA section 7003[17] and CERCLA section 106,[18] the government seeks in *CCC* a mandatory injunction, compelling Armco and its co-defendants to clean up the site. The injunction, which represents the lion's share of the relief sought,[19] is plainly an equitable remedy. Armco does not—and indeed could not—dispute that RCRA and CERCLA injunctive relief is equitable. The uniform holdings of every court to consider the question under RCRA or CERCLA, *e.g.*, *United States v. Price*,

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[17] RCRA section 7003(a) authorizes the government to bring suit in the event of an endangerment to "restrain" a generator, transporter, site owner or operator from handling, treatment, transportation or disposal of hazardous waste, or "to order such person to take such other action as may be necessary, or both." 42 U.S.C. § 6973(a). Congress explicitly stated that "section 7003 provides for the awarding of equitable relief." S. Rep. No. 284, 98th Cong., 1st Sess. 59 (1983).

[18] CERCLA section 106(a) authorizes the government "to secure such relief as may be necessary" to abate an endangerment posed by a hazardous waste site, and confers on the district court "in the district in which the threat occurs . . . jurisdiction to grant such relief as the public interest and equities of the case may require." 42 U.S.C. § 9606(a).

[19] The response costs incurred at the site for which restitution is sought consist merely of investigatory and litigation costs. First Amended Complaint in *CCC* ¶¶ 37, 50, 72.

688 F.2d 204, 212-13 (3d Cir. 1982) (mandatory injunction directing defendants to fund diagnostic site study is equitable),[20] reflect traditional general legal principles that an injunction is a purely equitable remedy, *e.g.*, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982) ("[i]t goes without saying that an injunction is an equitable remedy").[21]

Ignoring the principal relief sought in the underlying complaint, Armco focuses on the periphery. It seeks to make much of the fact that the government, as a corollary to its principal injunctive objective, also seeks reimbursement of response costs, such as investigatory and legal expenses, it incurred at the CCC site.[22] Armco asserts that these ancillary response costs are a form of restitution at law and therefore constitute damages. In reality, as with the injunctive relief counts, the remedy sought in the cost-recovery or restitution counts of the government complaint is plainly an equitable one.

Specifically, the Eighth Circuit's decision in *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 749 (8th Cir. 1986), *cert denied*, 108 S. Ct. 146 (1987), explains: "When the government seeks recovery of its response costs under CERCLA or its abatement costs under RCRA, it is in effect seeking equitable

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[20] *See also United States v. Conservation Chem. Co.*, No. 82-0983-CV-W-5 (W.D. Mo. May 14, 1985) (adopting Special Master's Recommendations Regarding General Dynamics Corporation's Demand for Jury Trial (April 29, 1985)); *United States v. Wade*, 20 Env't Rep. Cas. (BNA) 1853 (E.D. Pa. 1984); *United States v. Northeastern Pharm. & Chem. Co.*, No. 80-5066-CV-S-4 (W.D. Mo. Sept. 30, 1983), *aff'd in relevant part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987); *United States v. Reilly Tar & Chem. Corp.*, 20 Env't Rep. Cas. (BNA) 1052 (D. Minn. 1983).

[21] *See also United States v. Louisiana*, 339 U.S. 699, 706 (1950); 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2308 (1971); D. Dobbs, *Handbook on the Law of Remedies* 105 (1973).

[22] *See* First Amended Complaint in *CCC* ¶¶ 37, 50, 72.

relief in the form of restitution or reimbursement of the costs it expended in order to respond to the health and environmental danger presented by hazardous substances." [23] Once again, as with the equitable nature of CERCLA and RCRA claims for injunctive relief, this conclusion has been reached by *every* court to consider the question.[24]

Armco offers no reason for this Court to revisit its determination that this settled question of statutory interpretation does not require certiorari. Indeed, it never even acknowledges that earlier this year the Court refused to review it. *See United States v. Northeastern*

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[23] As the courts consistently have held, the theory of recovery in CERCLA and RCRA cost-reimbursement claims is for unjust enrichment, based on the government's substituted performance for the defendants in incurring costs in response to a toxic waste problem the defendants created. *E.g., United States v. Georgeoff*, 22 Env't Rep. Cas. (BNA) 1601, 1602 (N.D. Ohio 1984) (the "United States has performed the duty of another" and "acts to protect the public from potential danger caused by another's conduct, disposal of hazardous waste"); *United States v. Reilly Tar & Chem. Corp.*, 20 Env't Rep. Cas. (BNA) 1052, 1056 (D. Minn. 1983) (the "United States is asking for the return of monies it expended on Reilly Tar's behalf, to safeguard public health . . . . Such a return is precisely what the equitable remedy of restitution has as its goal").

[24] *E.g., United States v. Miami Drum Servs., Inc.*, No. 85-0038-CIV-SCOTT (S.D. Fla. July 17, 1986); *United States v. Dickerson*, 640 F. Supp. 448, 453 (D. Md. 1986); *United States v. Mottolo*, 605 F. Supp. 898, 913 (D.N.H. 1985); *United States v. Ward*, 618 F. Supp. 884, 913 (E.D.N.C. 1985); *United States v. Conservation Chem. Co.*, No. 82-0983-CV-W-5 (W.D. Mo. May 14, 1985); *Mola Dev. Corp. v. United States*, No. CV-82-0819-RMT (JRX) (C.D. Cal. Feb. 11, 1985); *Wehner v. Syntex Corp.*, 618 F. Supp. 37, 37 (E.D. Mo. 1984); *United States v. Tyson*, No. 84-2663 (E.D. Pa. Nov. 28, 1984); *United States v. Union Gas Co.*, 22 Env't Rep. Cas. (BNA) 1603 (E.D. Pa. 1984); *United States v. Wade*, 20 Env't Rep. Cas. (BNA) 1853, 1855-56 (E.D. Pa. 1984); *United States v. Argent Corp.*, 21 Env't Rep. Cas. (BNA) 1353, 1354 (D.N.M. 1983); *United States v. Reilly Tar & Chem. Corp.*, 20 Env't Rep. Cas. (BNA) 1052, 1056 (D. Minn. 1983).

Pharm. & Chem. Co., 108 S. Ct. 146 (1987).[25] Armco suggests no development since then that makes this issue worthy of certiorari now. There is none.

CONCLUSION

For all of the reasons set forth above, Armco's petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 9, 1987

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[25] A unanimous Eighth Circuit panel held in *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987), as all courts to address the question have, that CERCLA and RCRA claims for injunctive relief and restitution of response costs are equitable actions that do not seek damages. The author of that decision, Judge McMillian, dissented in *Continental Insurance Cos. v. Northeastern Pharmaceutical & Chemical Co.*, 811 F.2d 1180, *reh'g en banc granted*, 815 F.2d 51 (8th Cir. 1987), a case that considers insurance coverage for *United States v. Northeastern Pharmaceutical & Chemical Co.* His dissent stresses the obvious contradiction between holding that CERCLA and RCRA cost-recovery claims are not suits for damages in the environmental enforcement action, yet finding coverage for them *as suits for damages* in the insurance dispute. 811 F.2d at 1193-95. That issue is now before the Eighth Circuit *en banc*.

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No. 87-744

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ARMCO INC.,

Petitioner,

—v.—

THE MARYLAND CASUALTY COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF

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QUESTION PRESENTED

Whether the decision of the Court of Appeals for the Fourth Circuit conflicts with the policy of Congress to create a uniform, national framework for the clean-up of toxic wastes, under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §9601, *et. seq.*, by finding a wholly artificial distinction between actions by the Government under CERCLA Sections 107(a)(4)(A) and (B) on the one hand and Section 107(a)(4)(C) on the other, to support its holding that an insurer is not liable to defend or indemnify its insured under a policy containing standard comprehensive general liability ("CGL") provisions in an action for clean-up costs under CERCLA Sections 107(a)(4)(A) and (B).

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STATEMENT OF THE CASE

In the Brief in Opposition submitted by Respondent, The Maryland Casualty Company ("Maryland Casualty"), it characterizes the insurance agreement between itself and Armco Inc. ("Armco") as "handcrafted," thus attempting to create the impression that the language of the insurance policy clause at issue here is a unique provision specially negotiated between the parties to the contract. The policy language in fact is not a provision unique to Armco's general liability policy, but rather is standard form insurance policy language used throughout the liability insurance industry.

ARGUMENT

In its Brief in Opposition, the Respondent characterizes the issue before this Court as strictly a matter of state contract law and, therefore, not appropriate for this Court's consideration under the standards enunciated in Rule 17 of the Supreme Court Rules. Even a cursory reading of the opinion of the Court of Appeals for the Fourth Circuit and the opinion of the district court reveals that neither decision was based on any peculiarity of Maryland law. In fact, neither decision below identifies any Maryland insurance law precedent as controlling the outcome of the case,[1] nor does

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[1]The district court cited Maryland cases for its holding on choice of law, A-2, and for some general rules of construction, A-3. Likewise, the Court of Appeals for the Fourth Circuit cited a Maryland case for the proposition that an insurance policy is to be construed according to the meaning a reasonably prudent lay person would infer, A-16. The only Maryland law case upon which either lower court substantively relied is a federal district court decision, *Haines v. St. Paul Fire and Marine Insurance Company*, 428 F. Supp. 435 (D. Md. 1977), which, as was noted in Armco's Petition, is irrelevant to the issue here. (Insured claimed coverage under a professional liability policy for defense and indemnity in suit brought by the Securities and Exchange Commission against the insured to force disgorgement of illegal profits). References to the opinions of the court of appeals and the district court, reprinted in the Appendix to the Petition, are indicated by "A- ".

the Respondent's Brief in Opposition point to any decision of the Court of Appeals of Maryland as controlling. Instead, what is apparent from the opinions of the courts below and every brief filed by Respondent to date is that the courts below have decided the question of whether response costs are considered "damages" under the standard form CGL policy as a matter of general contract and insurance law.[2]

In its struggle to force this case into the mold of a simple question of state law, Respondent harkens back to the law-equity distinction which it urged on the district court and then abandoned in the court of appeals. *See* Respondent's Brief in Opposition ("Opposition") at 13 ("[other cases] support the findings, expressed by the district court, that '[b]lack letter insurance law holds that claims for equitable relief are not claims for 'damages' under liability insurance contracts.'") The Fourth Circuit characterized that distinction as "irrelevant" to the question to be decided and, instead, turned its attention to policy considerations such as whether response costs would be more or less than the loss in value to the property, and the necessity for certainty and economy in the insurance industry. (A-18 to A-20).

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[2]Maryland Casualty's claim that even if the Eighth Circuit were to reinstate the decision of the panel in *Continental Insurance Companies v. North Eastern Pharmaceutical and Chemical Company, ("NEPACCO II")*, 811 F.2d 1180, *pet. for reh'g en banc granted*, 815 F.2d 51 (8th Cir. 1987), the result would only be conflicting courts of appeals' decisions based upon differing interpretations of the laws of two states is equally unavailing given the clear reliance of the panel in the Eighth Circuit upon the decisions of other jurisdictions, rather than any peculiarity of Missouri state law. *See NEPACCO II*, 811 F.2d at 1186–87, *citing Lansco Inc. v. Department of Environmental Protection*, 138 N.J. Super. 275, 350 A.2d 520, 524–25 (1975), *aff'd*, 145 N.J. Super. 433, 368 A.2d 363 (1976), *cert. denied*, 73 N.J. 57, 372 A.2d 322 (1977); *Port of Portland v. Water Quality Insurance*, 549 F.2d 233, 235 (D. Ore. 1982); *Mraz v. American Universal Insurance Company*, 616 F.2d 1173 (D. Md. 1985), *rev'd*, 804 F.2d 1325 (1987); *Kutsher's Country Club v. Lincoln Insurance Company*, 119 Misc. 2d 889, 465 N.Y.S.2d 136, 139 (N.Y. Sup. Ct. 1983).

Armco's Petition for Certiorari presents an important federal question which is not dependent upon any particular issue of state law. Response costs are one of the principal forms of relief provided for by Congress in CERCLA, the federal toxic waste site clean-up statute. The insurance consequences which follow a claim for response costs are of crucial importance in effectuating the federal policies underlying CERCLA. This Court has recognized that there are certain kinds of issues in which the "federal interest is so strong that they should be resolved on the basis of a uniform judge-made federal law, rather than on the basis of varying state law." Wright, Miller & Cooper, *Federal Practice and Procedure* §§3563, 4514 (1982 & 1987 Supp.). Since *Erie Rail Co. v. Tompkins*, 304 U.S. 64 (1938), it has been settled that there is no "*general* federal common law" in diversity actions, but it is equally clear that in certain specific circumstances federal courts have fashioned general rules in the interest of upholding a federal policy embodied in a federal statute. *See, e.g., Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943); *see also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Texas Industries Inc. v. Radcliff Materials Inc.*, 451 U.S. 630 (1981); *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981); *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63 (1965). In *Wallis*, this Court noted that:

> In deciding whether rules of federal law should be fashioned, normally the guiding principle is that a significant conflict between some federal policy or interest and the use of state law . . . must first be specifically shown.

384 U.S. at 68. In such circumstances, the federal statute is the "prime repository of federal policy" and the starting point for elaborating a uniform national rule as a matter of federal common law. 384 U.S. at 69.

It is inevitable that allowing the rule enunciated by the court of appeals to stand will frustrate the important federal environmental policies embodied in CERCLA. To suggest

otherwise, as Maryland Casualty has in its Opposition, is to ignore the obvious.

The legislative history makes clear that Congress intended for clean-up under CERCLA to be performed promptly, without the delay of first establishing liability. As a practical matter, site operator defendants and generator defendants will be far less likely to cooperate in remedial efforts if their general liability insurance coverage is not available to defray the costs involved in remedying a CERCLA site. The essence of insurance is the trade-off of a certain loss in the form of a premium for certain coverage of a future loss which may or may not occur. If coverage is uncertain, the time lost in resolving that uncertainty will undoubtedly impact the primary objective of CERCLA—the clean-up and restoration of a hazardous waste site that presents an imminent public danger. The question of whether CERCLA response costs constitute "damages" for purposes of comprehensive general liability insurance presents an issue which is more appropriately resolved by the fashioning of a uniform national standard. *See Banco Nacional*, 376 U.S. at 426 (federal rule of decision is "necessary to protect uniquely federal interests"). Respondent has advanced no reason for having insurance coverage issues under CERCLA determined by the vagaries of state common law. This case proves the point. A CERCLA site in Missouri should be remedied under the same principles as one in Maryland. Those principles are matters of federal law.

Respondent also makes the unsupportable claim that the conclusion that response costs are equitable relief has been "reached by *every* court to consider the question." Opposi-

tion at 16 (emphasis in original).[3] Respondent entirely ignores the line of cases cited in the Petition holding that response costs in a variety of federal and state environmental clean up statutes are considered "damages" for purposes of a CGL policy. Petition at 13–15.

Finally, Respondent argues that in seeking coverage for CERCLA response costs, Armco is "ignoring the principal relief sought in the underlying complaint," namely, an injunction under Section 106 of CERCLA, 42 U.S.C. §9606, and is instead "focus[ing] on the periphery." Opposition at 15. Without addressing the issue of injunctive relief sought under Section 106 of CERCLA, the implication that Armco's claim for indemnity for response costs under Section 107 and the cost of defense is somehow defeated because the government's complaint for response costs is "on the periphery" of the action is altogether irrelevant. The only claim for indemnity and cost of defense asserted by Armco in this case has been for response costs under Section 107 of CERCLA, and the costs of defending the government's suit in the underlying litigation.[4] Respondent's liability in this case should be determined on the claims for which coverage was sought.

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[3]Respondent cites a line of cases which address the CERCLA response costs issue in the context of whether a generator or site operator defendant has a right to jury trial under the Seventh Amendment to the United States Constitution. Opposition at 16 n.24. These cases cannot dispose of the issue. Whether response costs are a form of remedy which invokes the right to a jury trial under Seventh Amendment analysis is a unique and narrowly circumscribed issue. There is no reason why an analysis of the constitutional right should govern the inquiry into rights and duties or payment of response costs under a CGL policy.

[4]It is black letter insurance law that the duty to defend exceeds the duty to indemnify in two ways: first, the duty to defend is invoked if the complaint on its face makes a claim for damages which would be covered under the policy, even if that claim turns out ultimately to be frivolous or unsupported, *Western World Insurance Co., Inc. v. Hartford Mutual Insurance Co.*, 784 F.2d 558 (4th Cir. 1986), and, second, if only one count of a multi-count suit states a claim for damages which would be covered under the policy, the insurer is obliged to defend the entire suit. *Brohawn v. Transamerica Ins. Co.*, 276 Md. 396, 347 A.2d 842 (1975).

CONCLUSION

For the foregoing reasons, Armco Inc. respectfully asks that this Court grant its Petition for Certiorari and set the case for briefing and oral argument.

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